FREE MOVEMENT OF SERVICES
BALANCE OF COMPETENCES REVIEW
PUBLIC RESPONSES

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Government's Review of the Balance of Competences between the UK and EU: Free Movement of Services Review

About ADS

ADS is the premier trade association advancing the UK's Aerospace, Defence, Security and Space industries, with Farnborough International Limited, the organisation that runs the Farnborough International Airshow (FIA), a wholly-owned subsidiary. ADS comprises around 900 member companies across all four industries, with over 850 of these companies identified as Small and Medium Size Enterprises (SMEs). Together with its regional partners, ADS represents over 2,600 companies across the UK supply chain.

The UK is a world leader in the supply of Aerospace, Defence, Security and Space products and services. With strengths in both manufacturing and innovation, the four sectors that ADS represents support one million UK jobs, export £22bn and invest around £3bn in Research & Development on an annual basis.

Summary of ADS submission

- This submission addresses the defence procurement section of the Government's call for evidence on the single market (free movement of services).

- The UK Defence Sector believes that the UK Government should resist any initiatives which would extend European Commission competence over defence procurement to the detriment of national member-state competence.

- The Commission should focus its attention on monitoring implementation of the recent Defence Procurement Directive. It has a role to play in increasing competition in the European market, supporting SMEs, and encouraging cooperation between member-states.

- The Commission's Communication on the defence and security sector is a welcome contribution to the debate on the European defence industry. However, the UK Defence Sector would wish to see the UK Government resist the Commission's proposals to review the negative effects of offsets in third countries and support defence marketing abroad, which would extend Commission competence over international trade in military goods.

1. Member-state competence over defence procurement

1.1. Responsibility for the fundamental European defence policy challenges continues to reside with individual member-states, and not the European Commission. The UK Defence Sector therefore wishes to see the UK Government resist any proposals

which would extend Commission competence in defence matters and undermine the national competence of individual member-states.

1.2. European defence industrial activity is dominated by a handful of member-states. It follows that any realignment of defence supply in Europe should be driven by those member-states.

2. Role of the European Commission in defence procurement

2.1. Ongoing financial constraints mean there is an economic imperative to spend more smartly on defence. This will require stronger cooperation between member-states.

2.2. UK industry recognises and supports the Commission's efforts to foster an open and competitive defence market that encourages innovation, while minimising bureaucracy and the regulatory burden on business.

2.3. The Commission has a key role to support the development of the defence internal market, through monitoring the implementation of the existing Defence Procurement Directive.

2.4. In developing any proposals, close engagement with member-states (particularly those substantially involved in the defence market) is essential to ensure that Commission initiatives complement the policies of member-states.

2.5. UK industry welcomes the recently implemented Defence and Security Directive and Intra Community Transfers Directive. These Directives should improve the performance of the European defence market, but they must be given time to embed before any further changes are proposed. The former directive is designed to increase collaboration; yet recent examples suggest the UK may be taking too restrictive a line in its interpretation of the Commission's intentions.

2.6. The Commission's draft regulations on Horizon2020 included unwelcome provisions on the transfer of intellectual property, which have been removed from the current draft. The Commission should understand UK industry's strength of feeling on this matter, and the UK Government should continue to monitor the situation closely.

3. European Commission Communication "Towards a more competitive and efficient defence and security sector"

The UK Defence Sector would wish to see the UK Government <u>resist Commission initiatives</u> in the following areas of procurement outlined in its Communication:

3.1. Action in relation to international trade in military goods. Any action by the Commission will extend or confirm their competence, to the detriment of national competence. UK industry does not therefore support the Commission Communication's proposals to: review the negative effects of offsets in third countries; and support defence marketing abroad. Commission involvement in defence marketing abroad would be particularly inappropriate, as it would risk undermining government-to-government activity and infringing on the sovereign ability to act.

3.2. While the Communication proposes no new legislation, it does intend to launch a Green Paper on control and ownership of critical industrial assets. UK industry does not consider that the Union has a legitimate or useful role in this area.

The UK Defence Sector would wish to see the UK Government prioritise the following initiatives, which should be driven by individual member-states based on agreements between national governments:

3.3. Agreement for the restrictive application of Article 346, and a clear definition and justification of member-states' requirements for sovereign industrial capabilities. The UK Government's 2012 Defence Technology Strategy White Paper offers a useful template.

3.4. Action by the Commission (as proposed in its Communication) to provide guidelines for the use of Article 346 in the field of State Aid.

3.5. UK Industry supports efforts to prioritise the simplification of rules and improve SME access to defence contract and sub-contract opportunities. The UK has the most extensive defence supply chain in Europe; it is therefore in the interests of UK industry to ensure that European supply chains are open to new SMEs.

3.6. A commitment from individual member-states for a step-change in consolidation of demand across Europe. This should include:

3.6.1. New projects and programmes being based on common capability requirements.

3.6.2. Recognition by member-states that collaboration should be the default (non-binding) option on major new programmes.

3.6.3. Greater use of common purchasing (cf European Defence Agency's nascent "Effective Procurement Methods"). Other potential measures might focus on: how financial mechanisms and incentives can support collaboration and encourage investment in defence; the availability of EU structural funding to address issues of rationalisation; and whether EU R&D funding could support dual-use technology products in appropriate circumstances.

3.7. Secure an intergovernmental commitment on security of supply of defence goods and services which would provide, at minimum, a political guarantee that, throughout the supply chain, a member-state will not veto exports destined for another member-states' armed forces. This is important for both procurement in the market as well as collaborative programmes, and would desirably be complemented by a 'best endeavours' statement in relation to exports to non-EU end-users.

3.8. Member-states' agreement to promote the provision of services to national MODs from the private sector to provide efficiencies, stimulate consolidation, and promote economic growth. The UK leads Europe in expanding the remit of the private sector in defence activities, particularly support.

Advertising Association response to the Government's review of the Balance of Competences between the United Kingdom and the European Union

Single market: Free Movement of Services review

17 January 2014

1. Introduction

1.1. The Advertising Association (AA) is the single voice in the UK for all sides of the advertising and promotions industry worth £17bn in 2012 – advertisers, agencies, and media. A list of AA members can be found here: http://www.adassoc.org.uk/Members.

1.2. We welcome the opportunity to respond to this consultation and to provide input to HMG's thinking and understanding of the value of EU membership, how it affects the UK, and how value of the single market in services can be improved.

1.3. It is extremely important to ensure the right balance of competences between national and EU legislation, responsibilities, and powers. The right balance will ensure that the national advertising ecosystem is supported or in the least protected from unhelpful EU rules that may stymy the sector, and that cross-border commerce, media, and advertising is encouraged through a true single market in these services. The country of origin principle is the most important cornerstone to achieving these aims.

1.4. This response will limit itself to commenting on procedural weaknesses in the EU process. It will focus on the single market in audiovisual media services and cross-border advertising and therefore use as examples the Audiovisual Media Services Directive (AVMSD), E-Commerce Directive, and the Data Protection Regulations (DPR) currently under discussion.

2. Advertising and the Creative Industries

2.1. The creative industries, and marketing & advertising within that, are a key UK sector. The January 2014 statistical report by the Department of Culture Media and Sport[1] found that 1 in 12 jobs in the UK is in the Creative Economy. 'Advertising and marketing' remains the second highest employer within the Creative Economy, making up 18% of the Creative Economy. In 2012, employment growth in the Creative Industries (8.6%) was 12 times that of the wider economy (0.7%). The rate of export growth for the Creative Industries, from 2009-2011, increased by 16.1% compared to 11.5% for total UK exports.

2.2. As was found by research carried out by Deloitte: "The advertising industry is central to the creative industries. It provides a third of all TV revenues and two-thirds of newspaper revenues; it supports sectors from photography to film production. We estimate that over 550,000 people work in jobs that are funded by advertising revenues, or involved in the commissioning, creation and production of advertising across the relevant supply chains."[2] The UK advertising industry is recognised across Europe for its leadership in adspend, creativity, and effective system of self-regulation.

[1] Creative Industries Economic Estimates: January 2014 Statistical Release. DCMS. Available here.
[2] Advertising Pays: How advertising fuels the UK economy. Deloitte. 2012. Available here.

3. European Procedures and Regulatory Principles

3.1. The AA recognises that the Government – Whitehall and Westminster – engage with industry effectively and seek to understand the concerns of key economic sectors. We recognise that the UK Perm Rep in Brussels successfully briefs UK MEPs and feeds into the Council effectively. We would welcome however greater dialogue between Westminster and the European institutions as this would help to ensure consistency in policy proposals, principles, and approach. For purely UK-based organisations such as the AA, greater dialogue would facilitate inputting to EU proposals.

3.2. European institutions should adopt some clear values that reflect the Better Regulation Principles in the UK. In addition, these principles should provide clarity on when the EU should take forward action versus subsidiarity at Member State level. We have noted that the boundaries of EU action can be vague (despite the treaties to clarify this) and lead to over-reaching by the Commission.

3.3. Two key principles are those of proportionality and evidence-based policy-making. On this latter point, we consider that there is often too much reliance on Eurobarometer data which is not necessarily the best source of information on consumer attitudes and is over-relied on as an authoritative source to justify new legislation. On the former, we note a lack of meaningful impact assessments – absolutely key in ensuring adherence to principles of proportionality and subsidiarity.

3.4. We are concerned about certain European procedures which are not transparent, subject to political trade-offs not in the best interests of policy-making, and easily and quickly move away from the evidence-base for action. For example, the trilogue process between the Commission, Council, and representatives from the European Parliament is informal and closed, but key to final agreement on legislation and regulations.

3.5. Also, the Delegated and Implementing Acts provided by the Lisbon Treaty have removed oversight by Parliament and Council. While we recognise the need to be able to make small technical amendments without going through a lengthy political legislative procedure, we are concerned that such Acts can be open to abuse and allow the Commission to give itself significant powers while taking them away from national authorities. For example, the Commission's proposed update of the Data Protection rules included 26 provisions that grant the Commission the power to adopt Delegated Acts, with a further 19 provisions that allow the Commission to adopt Implementing Acts. The Council and Parliament texts have stripped out the vast majority of these references, highlighting the Commission's overzealous use of these tools. The remaining references are still worrisome: one such reference still allows the Commission to make significant changes, under the guise of additional protections for children, that could affect the implementation of the entire Regulation.

3.6. Because of this, we prefer a principles-based approach to European legislation and full harmonisation and prescriptive rules only when they serve for the better functioning of the single market and therefore the removal of barriers to trade.

3.7. Because of this, we prefer a principles-based approach to European legislation and full harmonisation and prescriptive rules only when they serve for the better functioning of the single market and therefore the removal of barriers to trade.

4. Country of Origin Principle

4.1. The Country of Origin principle is fundamental to the functioning of the single market in media and advertising services:

- It is this principle that allows companies established in the EU to be able to take advantage of the Internal Market.
- Barriers to this freedom will deny EU citizens getting the quality of service and choice that they deserve, whilst also restricting competitiveness within the EU.
- It ensures that UK information society services can derive legal security through compliance with only UK law while enabling UK companies to operate across Europe. It is particularly important for those small and medium-sized enterprises (SMEs) that do not have the means to be legally or operationally present in every EU Member State.

4.2. Without this principle, maintained in its purest form, we believe that cross-border media, advertising, and e-commerce activity would decrease significantly. The AA would wholeheartedly oppose any moves to water-down the Country of Origin Control mechanism as it relates to the commercial communications sector.

4.3. In terms of the balance of competences between the EU and Member States, it is important that Member States do not have new powers to restrict services from service providers established in another Member State which complies with their home country rules. 'Media service providers' and the advertising they carry, should be subject only to the law of the country where they are established. In exchange Member States have to ensure that the common rules of the Directive applicable for the whole of the EU are respected by those operators established in their countries.

4.4. We believe that the currently applicable AVMS Directive and E-Commerce Directive are effective and do not need to be reviewed at present.

4.5. Broadly the AVMS Directive is effective in ensuring and protecting cross-border audiovisual media services. However, work has begun at DG Connect to prepare for a potential review of the Directive in 2015 despite it not yet being fully transcribed into national law in all Member States. Knowing when <u>not</u> to take action is also important in ensuring the right balance of competences.

5. Barriers to a single market in e-commerce

5.1. The AA is keen to work with the European Commission to increase the take-up of e-commerce. As an industry, we have benefited from the free market principles set out within the Directive which have increased the take-up of cross-border e-commerce, in parallel increasing cross-border online advertising. We do not believe that a review of this Directive is the solution to low take-up. While changes to legislation may appear a silver bullet, it is vital for proposals to be evidence-based and proportionate and therefore for national governments to take forward actions that address key underlying barriers such as computer literacy, buying habits, and access to the internet and broadband penetration. The UK is one of the leading economies for e-commerce and this can be explained by favourable conditions in these areas. Indeed, we believe that other Member States could usefully learn from the policies that have worked in the UK to achieve high levels of e-commerce, and look to developing them in their jurisdictions also. This bottom-up approach rather than top-down is likely to be more effective in addressing consumer access and

confidence in cross-border e-commerce. Therefore, whether action is taken at national or European level requires information and assessments of the most effective route to policy goals.

1.1. There are a range of other barriers to e-commerce that the Advertising Association believe act as a hindrance to cross-border e-commerce. Member States can act to unreasonably and unhelpfully undermine the intentions of a single market by protecting their markets through national legislation. One example – of many – is the transposition of the Waste Electrical Electronic Equipment Directive into Irish law which makes it very difficult to sell electronic goods into the Irish market from other member states. Addressing this problem, and others similar to this, should be a priority at EU level.

5.2. Another concern which could potentially lead to an undermining of the e-commerce sector relates to the Data Protection Regulation, currently under discussion. We believe that the overall approach should be technology-neutral. However, the proposals threaten the very existence of many business models which rely on the analysis of data. Today's advertising models would be severely impacted, depriving many website owners, publishers, and small businesses of revenues, compromising access to high quality news, information, and entertainment, as well as putting future innovation in danger. While Commissioner Reding believes that harmonising 28 national data frameworks will lead to administrative savings of £1.9bn each year, proposals that are too restrictive will simply stifle the sector, and the opportunities for both consumers and business, of online advertising. However, we agree that the intention for a single data protection regime is helpful and as leaders in e-commerce, the UK stands to gain from regulations that are proportionate.

6. Conclusion

6.1. The UK advertising industry makes a significant contribution to the UK creative industries and to the UK economy. It therefore welcomes initiatives to create more cross-border opportunities through a true single market in media, e-commerce, and advertising. The Country of Origin principle is the cornerstone of ensuring that the UK can benefit most from the opportunities presented by the single market and should be reinforced and protected. Risks and barriers to a true single market in media and advertising include European proposals which must successfully balance consumer protection concerns against the value and benefits provided by a well-funded media. While we value the merits of full harmonisation, we believe that EU policy should be principles-based, evidence-based, and proportionate and that more prescriptive regulation be held by national authorities, unless there is a strong case for full harmonisation at EU level.

APPENDIX

FREE MOVEMENT OF SERVICES BALANCE OF COMPETENCE CALL FOR EVIDENCE - DEFENCE PROCUREMENT QUESTIONS

Overriding Question : Your views on the effect of EU action so far in the defence sector and on the desirability of further action

1. What do you see as the advantages and disadvantages of EU action in defence procurement and the defence industry more widely?

a. How appropriate is the current balance of competence between EU and Member States?

Essentially a political question, however there is a tension in the current situation in that :

- *Security is the sole responsibility of each member state, whilst*
- *The EU is committed to a Common Foreign Security Policy, and in its support a Common Security and Defence Policy – but with no real means to deliver this commitment*

Against a background of declining defence spending, including R&D, the existence of essentially some 27 different markets, the uneven distribution of both demand and means of supply and increasing competition/capability from outside the EU – there are problems which need to be addressed at EU level otherwise the impact on the Defence Industrial Technology Base will be severe (loss of capability and employment) which will impact at national level. Currently the EU is limited to taking action in strengthening the internal market for defence and security, strengthening competitiveness of EU industry and exploiting the potential of dual use technologies....there is more that the EU could undertake (e.g. joint R&D and procurements, active support for EU interests outside the EU (such as insistence on no offsets or review of discriminatory pricing))

b. How successful are Member States in implementing the existing Defence Package?

Difficult to answer given a lack of definition of 'Defence Package, and personal knowledge of progress in countries outside the UK. However the UK has implemented and diligently applies the Directives (2009/81/EC and 2009/43/EC); and based upon current bidding activity in Portugal, it appears that the Portuguese MoD is cautious in its approach to tendering based upon implementation of the Directives

c. In your experience do Member States take a consistent approach to enforcing EU rules, or not?

Difficult to answer due to lack of personal knowledge, but.....No – e.g. Portugal has waived the requirement for Offset in military contracts whilst Denmark continues, relying on Article 346, to insist on Offsets

d. How do you consider Member States current use of Article 346 impacts upon defence industry across the EU?

Negatively – e.g. Denmark's recent MRH competition was run under Article 346 and the result was an award to a non EU contractor. Specific issues here were the running of a competition between the US Government (through FMS) and commercial organisations (AW) and the requirement for Offset which results in higher costs to meet essentially an illegal requirement

2. To what extent do you believe that the costs of European rules[1] in the defence industrial sector are proportionate to the benefits?

a. To what extent do you think EU action in the defence industrial sector helps or hinders UK businesses?

Difficult to answer due to lack of experience in 'EU action in the defence industrial sector'. Whilst data is scarce, the EU's own figures show that the amount of Cross border contacting by the large buyers (Italy, UK, France and FRG) is very low.

b. To what extent has EU action in the defence industrial sector brought additional costs and/or benefits when trading with countries inside and outside the EU?

Again difficult to answer due to a lack of personal experience and the shortness of time that the Directives have been in force; however:

- *Inaction by the EU has more impact – e.g. not challenging Denmark's use of Article 346 – currently it is for the aggrieved party to bring legal proceedings to challenge the use of 346 or to file a complaint with the Commission.*
-
- *The Directives have induced more caution in procuring agencies approach (e.g. the UK and Portugal) whereby procurement cycles are lengthened and costs increased (by having to respond to more tenders)*

3. What is your view of the effect of EU rules on the defence industrial sector?

a. How well are the EU's mechanisms for delivering its policy objectives in defence, including promoting a single market in defence goods and services, currently working?

It is probably too soon to asses this properly against the background of declining defence budgets. The Commission does in fact publish an annual report on the application of the Defence Directive by Member States but to date these have been at a top level and have focuses mainly on whether individual states have correctly adopted the Directive and what enforcement action has been taken by the Commission.

[1] Essentially the Defence Procurement Directive and Intra Community Transfers Directive

b. What obstacles still remain to the creation of a single market in defence goods and services?

- *Varying interpretations of the use of Article 346 and Offset (e.g. Denmark and Finland)*
- *Unfair competition from FMS*
- *Differing national labour regulations – e.g. use of temporary labour in manpower provision for aircraft servicing (FISS II)*
- *Differing demands by the member states in terms of procurement rules, specifications (bespoke vs Off the Shelf), quantities and timing*

c. Is there a case for more proactive enforcement of the existing EU Defence Package by the Commission to ensure a level playing field?

Yes, for example any country wishing to utilise Article 346 on any procurement should have its use 'pre-approved' by the EU. Currently the EU seems to wait until after the event or until a complaint has been filed. This would give industry confidence that such use is genuine as opposed to a political expediency. An alternative in the procurement context would be to require the State to obtain the consent of potential tenderers to the use of 346 and, if any of them objected, to run two concurrent procurements, one under 346 and the other under the normal rules!

4. Going forward, what are the advantages and disadvantages of an increased role for the EU in the defence industrial sector?

a. What areas, if any, would merit increased attention from the EU?

- *Consistent enforcement of extant regulations*
- *Support and protection to EU companies on the world stage – in particular positive action to counter influence of FMS sales and mitigation of offset in other countries*
- *Support to military R&D within EU companies*
- *Planned rationalisation of EU capacity*

b. What future challenges/opportunities might we face in the defence industrial sector and what impact might these have on the national interest?

The main challenges foreseen are declining demand within the EU, declining R&D spending, fragmentation of the demand amongst 27 different markets, duplication of capacity (e.g. in rotorcraft), increased (and unfair) competition from outside the EU (FMS and in the future from the BRIC countries). These factors will impact on UK industry's ability to both develop new products (and hence harm the industrial base) and compete effectively both within and outside the EU; ultimately leading to a loss of capability and employment.

c. What role do you see for the EDA in the defence industrial sector?

Unless here is a radical shift in how Europe approaches its defence needs the role will be limited. However the following can be considered:

- *Agency to agree common requirements for procurement (technical and commercial)*
- *Pooling arrangements for the provision of goods (e.g. aircraft) and services (e.g. training) – especially to the smaller member states*
- *Market analysis*
- *Planning for the defence requirement at EU level and how to best protect and develop existing industrial and military capability against threats from outside the EU.*

Airbus Group Submission on EU-UK Balance Of Competencies

General – Defence Services

How appropriate is the current balance of competence between the EU and Member States?

- Generally satisfactory but the issue has been more about differing attitudes to protectionism by member states and how these are reflected in their respective legal systems. The legal obstacles to a more open market were largely addressed by directives 2009/43/EC and 2009/81/EC, which attempted to tackle intra-EU transfers of Defence Products and coordinated EU and Member State procurement procedures. Experience shows that the application of Defence and Security Public Contracts Regulations SI 2011 No 1848, which were compiled by the UK MoD to reflect fully the EU Directives on Defence Procurement is largely reasonable and logical.

How successful are Member States in implementing the existing Defence Package?

We cannot comment on this regarding other Member States, but believe that the UK is zealous in its implementation.

In your experience do Member States take a consistent approach to enforcing EU rules, or not?

- Probably not, where it seems rare for significant Defence contracts to be of their borders (perhaps through use of Article 346).

  How do you consider Member States current use of Article 346 impacts upon defence industry across the EU?

- When applied correctly, it is right and proper. Difficulties arise when the scope under which this article could apply is stretched for protectionist reasons, thus preventing open competition.

- If Article 346 of the Treaty (which needs to be updated for all EU nations) is applied to any capability then this would be a blocker to entry and needs to be audited properly *The Commission has considered for some time that Article 346 has been used by some Member*

States to exempt contracts from procurement rules for economic reasons rather than on grounds of security interests; and the CJEU has made clear that Article 346 can only be called upon in exceptional and clearly defined cases. In 2007, the Commission's "Defence Package" sought to reduce some of the differing national approaches to defence regulation and create a more European defence market. This culminated in the agreement of the Defence and Security Procurement Directive (2009/81/EC), a Directive specifically adapted to the needs of the defence sector, and which should therefore reduce resort to the Article 346 exemption.

- In lieu of the UK ever following the other EU countries and interpreting such regulations for the benefit of their own industries, UK needs to push hard for the use of this exemption to be minimised in other European countries.

To what extent do you believe that the costs of European rules (essentially the Defence Procurement Directive and Intra Community Transfers Directive) in the defence industrial sector are proportionate to the benefits?

- There are potentially considerable costs associated with European rules. These can be mitigated with experience and a clear understanding of the rules and their implications.

To what extent do you think EU action in the defence industrial sector helps or hinders UK businesses?

This is more about consistent application of the rules rather than the balance of competencies themselves.

To what extent has EU action in the defence industrial sector brought additional costs and/or benefits when trading with countries inside and outside the EU?

- EU action and rules e.g. safety rules can have serious cost implications on products and services sometimes leading to uncompetitive in the EU market. On the other hand these can result in better products and services.

What is your view of the effect of EU rules on the defence industrial sector?

- EU rules have improved products and services but have not always been condusive to fair competition.

How well are the EU's mechanisms for delivering its policy objectives in defence, including promoting a single market in defence goods and services, currently working?

- The 2009 changes did help in liberalizing the Defence Market amongst EU Member States, particularly the 'transfer directive', but that there remains room for improvement.

What obstacles still remain to the creation of a single market in defence goods and services?

- The principles of a non-discriminatory treatment for all EU based companies and transparency in the process of selecting a winning contractor need to be strengthened and strictly enforced?
- National industrial strategies and sovereignty.
- National security.

Is there a case for more proactive enforcement of the existing EU Defence Package by the Commission to ensure a level playing field?

- Absolutely – Member States that make use of derogation rights under Art 346 need to be audited and sanctions applied for non-compliance.

Going forward, what are the advantages and disadvantages of an increased role for the EU in the defence industrial sector?

- Management of the transition and evolution from national only defence acquisition and services to collective defence capabilities. This will have to be underpinned by a common European defence policy and a possible restructuring of industry.

What areas, if any, would merit increased attention from the EU?

- Enforcement of the true intentions of Article 346.
- Collective defence plans.
- An understanding and consequences of the future of the defence industries.

What future challenges/opportunities might we face in the defence industrial sector and what impact might these have on the national interest?

- Provision of cross border services through 'stateless' providers, i.e. the Amazon/Google model

What role do you see for the EDA in the defence industrial sector?

- Consolidation and procurement of Defence goods and services for smaller Member States and assistance in the formation of pan-European Defence Standards

- There are disparities in defence acquisition across Europe and these will only be resolved by the EU encouraging member nations to take a European wide approach.

- EU Provisions for services across borders in Defence is in theory all right but there are issues
- UK Industry is well ahead of other EU nations in delivering defence services.
    - In the UK outsourced ISS was valued at 2.7Bn Euro and is forecast to rise to c. 4.9bn by 2020.
    - The trend in the UK is for continued growth in services to continue.
    - This gives UK companies much more experience than companies of other EU nations and the ability to offer value to other EU nations clients.
    - The forecast in the rest of Europe is to level off around 2020.
- Cross border services (which would be close to the operators) raises the challenge of culture and security. However, UK industry as evidenced by current practice will use locals to deliver the service.
- Defence continues to remain a National sovereign responsibility despite treaties and intentions (EDS etc). However, an example of success is Sky Net 5 which provides Satcom services to NATO, France and Belgium. This is an example of success probably driven by austerity. In addition, it demonstrates the concept of delivering a service across borders with minimal presence in the customer country/organisation.
- There is an evolution that Europe must go through including inter alia the following:
    - The evolution to collective defence. This will take decades and will affect industrial capacity and capability within the EU.
    - Accept that supporting military capabilities can be conducted by non-defence companies.
    - The current tribalism and protectionism will have to give way to open competition greater than that achievable under the 2009 Directive.
    - There is an example of a German based company operating the French pilot training school in Cognac with the service being offered to the UK RAF. This makes sense and would address the issue of the unaffordability of individual nation's pilot training. Although this service could be applied easily across borders, it is often precluded on the grounds of traditional ethos within air forces.
    - On the other side how would non-EU companies (all non-EU businesses set up as legal entities in the EU and end up trading as EU companies) with vast experience be allowed to play and would this put drag on Euro companies in developing service capabilities.

Airbus Group
8 January 2014

ALL-PARTY PARLIAMENTARY GROUP
on
MODERN LANGUAGES

SUBMISSION TO THE DEPARTMENT FOR BUSINESS, INNOVATION AND SKILLS ON THE GOVERNMENT'S REVIEW OF THE BALANCE OF COMPETENCES BETWEEN THE UNITED KINGDOM AND THE EUROPEAN UNION
January 2014

SUMMARY

1. The APPG on Modern Languages welcomes the opportunity to contribute to this review. Our response is general rather than specific, bringing together evidence from a range of sources to show that the UK is failing to derive the full economic, political and educational benefits from membership of the European Union, and international engagement more broadly, because of a lack of language skills.

2. We welcome moves by the Department for Business, Innovation and Skills to boost the uptake of languages in degree courses, and to bring forward new evidence[1] on the losses to the UK economy as a result of the inability to communicate freely with international partners acting as a 'tax on trade'. Similarly, we are pleased that the Department for Education has recognised the need to improve the national capacity in languages by making the study of a foreign language part of the new National Curriculum from age 7, and giving languages a certain prominence within school performance tables through the English Baccalaureate measure.

   However, the need to value and develop language skills is a concern which affects **all** government departments and the review of the UK's relationship with the European Union provides an opportunity to raise awareness more widely of the need to boost Britain's linguistic capacity, in the interests of individuals' educational experience, the future

[1] 'Research to quantify the costs to the UK of language deficiencies as a barrier to UK engagement in exporting' commissioned from Professor James Foreman-Peck, Director of the Welsh Institute for Research in Economics and Development at Cardiff University, and due to report on 31 January 2014.

competitiveness of the UK economy and our international standing and reputation.

BACKGROUND

3. The APPG was established in January 2008 and its terms of reference are to:

- explore the educational, skills-related, employment, competitive and cultural benefits of learning and using modern languages throughout the United Kingdom;
- provide a parliamentary forum for information exchange, discussion and consultation; and
- encourage and support policies and action to improve the take-up of modern languages in schools, further and higher education, in the workplace and in the community.

4. Over the last six years, the APPG has held regular meetings at which we have had the benefit of hearing from and questioning a wide range of experts. These have included employers and departmental officials, academics, researchers and policy advisers, professional and specialist bodies as well as teachers, head teachers and pupils.

5. Recent compelling evidence shows that the UK's capacity in languages falls far below that required by business, government and third sector organisations in order to increase UK exports, attract inward investment, protect national interests in UK security and global influence, and facilitate knowledge transfer and innovation internationally[2].

6. **Our overall conclusion is that the national deficit in languages is now so serious that it needs to be acknowledged and redressed by coordinated cross-government action across a range of departments including the FCO, BIS, the Home Office, the Treasury and the Department for Education.**

LANGUAGE SKILLS AND EXPORTS IN THE SINGLE MARKET

7. There is now a considerable body of evidence, both policy-oriented and academic, which shows that languages are linked to export growth. In the last year or so, both the CBI and the British Chambers of Commerce have published reports calling for improved language skills among British graduates and college leavers in order to boost export performance[3]. Business leaders say that language availability, instead of market strategy, is driving exporting decisions, and that a lack language and cultural

[2] See in particular: British Council, 'Languages for the Future. Which languages the UK needs and why'. 2013 and British Academy, 'Languages, the State of the Nation'. 2013.
[3] CBI/Pearson, 'Changing the Pace. Education and Skills Survey 2013'. British Chambers of Commerce, 'Exporting is Good for Britain', 2012.

capability is a barrier for non-exporters who want to start trading internationally.

8. The econometrist Professor James Foreman-Peck has shown that market failure in language skills affects the UK disproportionately: whilst there is an inbuilt tendency for everyone to under-invest in language skills, patterns of world trade show that, allowing for other factors, the UK is more likely than other countries to gravitate towards trading partners which have a language in common[4]. A pre-publication report on his latest research for BIS states that language deficiencies are costing the UK economy **£48 billion per year**, or 3.5% of GDP[5].

9. Lack of language skills acts as a barrier to the **free movement of services** across the EU, since effective communication is a key factor in service provision. However, service providers in other member states are currently at an advantage over Britain given that English is the first language taught in most other European countries, whereas British companies are at a relative disadvantage through not having access to the necessary language skills.

10. The CBI/Ernst and Young report 'Winning Overseas' makes it clear that the need to improve foreign language competence is not simply a question of communication skills to service existing or future markets, but about the **internationalisation of business outlook** and the rebranding of the UK as being 'open for business'.[6] Whether in agriculture, energy or information technology, the inability to move beyond English limits access to innovative practices and international networks for **knowledge transfer**.

11. The British Academy's report 'Languages, the State of the Nation' showed how a tendency for business and management to under-estimate the importance of foreign language skills – combined with the practice of recruiting foreign nationals with language skills, has the effect of depressing demand for languages and the motivation to study them within the UK population, creating a **vicious cycle of monolingualism**[7].

12. We conclude that stimulating the acquisition and exploitation of language skills would bring important benefits to British export performance and would allow employers in a range of sectors to take greater advantage of the Single Market in goods and services.

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[4] James Foreman Peck, 'Costing_Babel. The Contribution of Language Skills to Exporting and Productivity'.
[5] 'UK businesses are lost for words', The Guardian, 10 December 2013
[6] CBI/Ernst and Young, 'Winning Overseas : Boosting Business Export Performance', 2011.
[7] British Academy, 'Languages, the State of the Nation', 2013.

LANGUAGE SKILLS AND JOBS IN THE SINGLE MARKET

13. Poor or non-existent language skills impact on the opportunities for UK individuals to take advantage of **labour mobility** within the Single Market, whilst leaving them open to competition from incomers. Whilst UK employers are dissatisfied with the language skills of British graduates, they are enthusiastic recruiters of multilingual graduates from other EU countries. In a recent survey, nearly 57% of UK employers said they recruited from other EU countries, compared with a European average of 30%[8]. Although this shows that the Single Market is working well in terms of the free movement of persons, British workers are limited in their ability to take advantage of this freedom in the opposite direction because of their lack of language skills.

14. The UK Treasury has noted that the UK's financial services sector benefits from the widespread use of English. Whilst this may be true, the British Academy's study of the labour market for languages[9] shows that this and other highly globalised industries such as energy and IT also require skills in other languages. An over-reliance on English is already harming our international interests as UK monolinguals find themselves unable to compete for key jobs and this is harmful not only to the employment and career prospects of UK nationals, but to the UK's capacity for influence within these global companies.

15. The availability of language skills is one of the key factors for attracting **foreign direct investment**, as shown in the global property company Cushman and Wakefield's annual European Cities Monitor. London regularly performs well in this survey because of the diverse range of other languages spoken. In its 2011 report 'Making the UK the best place to invest', the CBI cited the English language as one of the UK's key strengths which is however offset by our relative inability to work in multiple languages[10]. Scotland recently lost the opportunity to attract the European sales headquarters of a major petrochemical company because of the inability to recruit staff with language skills[11].

16. The social and economic consequences of poor language skills are not evenly spread across the UK. Participation in language learning beyond the compulsory phase is strongly linked to social advantage and children in less developed and more deprived areas of the country are less likely to gain qualifications such as a GCSE or A level in a language[12]. This adds to regional or local cycles of deprivation in terms of inward investment, unemployment rates and access to international opportunities.

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[8] Eurobarometer and European Commission, *Employers ' Perception of Graduate Employability Analytical Report*, 2010.
[9] Languages. The State of the Nation, 2013
[10] CBI, 'Making the UK the best place to invest' 2011
[11] Grove, D., 'Talking the talk, so that Scotland can walk the walk. The case for improving language skills in the Scottish workforce'. 2011
[12] See Languages, the State of the Nation, op cit.

17. Improving Britons' language skills would enable individuals to take greater advantage of opportunities for employment within the Single Market, and be better equipped to compete for jobs at home. It would also ensure help attract inward investment, particularly in areas which are currently poorly supplied with language skills.

LANGUAGES AND INTERNATIONAL INFLUENCE

18. The Foreign and Commonwealth Office has noted that a **shortage of British staff in international institutions** is detrimental to the national interest and undermines UK policy influence internationally. It highlighted that UK nationals make up only 5% of the European Civil Service, whilst accounting for more than 12% of the population of Europe. In 2011 only 2.6% of applicants were from the UK - fewer than from any other member state - and a key reason for this was that English-speaking applicants must offer either French or German as a second language[13]. This situation is no doubt repeated in international organisations worldwide.

19. In recognition of the importance of languages as fundamental to effective diplomacy, the Foreign and Commonwealth Office has re-opened its language centre, and the Foreign Secretary William Hague has spoken eloquently of the way that language skills help to predict and influence behaviour in foreign cultures[14].

20. An enquiry last year by the British Academy showed that in a rapidly changing landscape for international engagement and diplomacy, languages skills are essential for **effective security and international influence**[15]. The Rt Hon Richard Ottaway MP, Chair of the Foreign Affairs Select Committee, says that this issue has been highlighted in almost every enquiry he has undertaken since 2010.

21. Improving Britain's language capacity would enable UK nationals to have greater influence in international organisations both within and beyond the European Union.

LANGUAGES AND INVOLVEMENT IN EUROPEAN COOPERATION PROGRAMMES

22. UK participation in EU mobility programmes, which improve employability and equip individuals with skills and competences to work across borders, is a fraction of that of comparator countries such as France

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[13] Blog by David Lidington, Minister for Europe on FCO website accessed 13/8/12 http://blogs.fco.gov.uk/davidlidington/2012/03/20/more-british-nationals-in-the-eu-civil-service-can-transfrom-our-influence/

[14] https://www.gov.uk/government/speeches/foreign-secretary-opens-foreign-office-language-school

[15] British Academy, 'Lost for Words. The need for languages in UK diplomacy and security'. 2013.

and Germany. This is a particular concern in the light of the new **Erasmus Plus programme** starting in January 2014 which will provide opportunities for 4 million Europeans to study, train, gain work experience or volunteer abroad.

23. In 2011, only 4,265 Britons took part in work experience placements in another European country under the Leonardo programme, compared to more than 10,000 French and nearly 15,000 Germans[16].

24. UK participation in overseas university placements under the Erasmus programme is around one third that of France and Germany, with only 13,662 Britons benefitting in 2011/12 compared to more than 33,000 in both France and Germany and nearly 40,000 in Spain[17].

25. European Parliament research into take up of Erasmus placements, which interviewed students in 7 countries, found that lack of language skills was the major reason, after finance, why students were put off taking part. The deterrent effect of lack of foreign language skills was highest amongst UK students (62% compared to an average of 41% across all countries)[18].

26. Organisations such as the CBI and the Council for Industry and Higher Education (CIHE) have stressed the importance of international experience for acquiring the language and cultural skills which are increasingly valued by employers[19], and the Department of Business, Innovation and Skills' Joint Steering Group on Outward Student Mobility has recommended that greater emphasis should be placed on language skills at primary, secondary and tertiary levels within the education system[20]. The House of Lords EU Committee has also concluded that the UK's prevailing monoglot culture is a barrier to British students participating in Erasmus and other mobility schemes to the same extent as those of other member states[21].

27. Improving Britain's language capability would enable UK individuals to take greater advantage of the opportunities to participate in work experience and study placements offered through the new European Union programme Erasmus Plus.

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[16] European Commission, *Leonardo Da Vinci Mobility Figures by Country in the Years 2000 – 2011 (Number of All Individuals Who Went on Mobility to Another Country)*, 2011, mmxi, 2011. (Latest figures available)
[17] European Commission, *Erasmus Figures 2010-11*, 2011.
[18] European Parliament, *Improving the Participation in the Erasmus Programme*, 2010.
[19] E.g. J Diamond, A, Walkely, L, Forbes, P, Hughes, T, Sheen, *Global Graduates into Global Leaders* (AGR/CIHE).
[20] Joint Steering Group on UK Outward Student Mobility, *Recommendations to Support UK Outward Student Mobility Submitted to David Willetts by the Joint Steering Group on Outward Student Mobility , March 2012*.
[21] House of Lords European Union Committee, *The Modernisation of Higher Education in Europe*, 2012.

RECOMMENDATIONS

28. In order to ensure that the UK and its citizens derive the full economic, cultural and educational benefits from membership of the European Union, and to engage more effectively in international networks more generally, the APPG on Modern Languages urges Her Majesty's Government to implement the following:

- **A national languages recovery programme** in education and training. This should include high quality language learning with ambitious targets in both primary and secondary schools up to school leaving age, as well as opportunities and encouragement for older students to continue with a language either as a specialist discipline or alongside other studies.

- Drawing on the resources of all government departments to **stimulate demand for language skills** through training and awareness-raising and to improve practices in the strategic management of language skills. This should include, for example, auditing the linguistic skills of existing employees, implementing training and recruitment policies which favour language skills, and improving understanding of how to use specialist language services including interpreting and translation services.

- Appointing a **single government minister** responsible for coordinating government policy on foreign languages across departments.

Baroness Coussins
Chair, All-Party Parliamentary Group on Modern Languages
January 2014

Liberalisation of services document

- liberalisation of services is an inherent equaliser of labour legislation, if taken to its logical extreme. So it is good for EU integration, although not necessarily aligned with the timing and objectives of country elections.
- in practice however (and until that equalisation happens), there are practical examples of friction (such as in the transport business), when services can freely compete accross frontiers with very different economies.
- as competition increases and becomes ubiquitous, there is a real need for a reliable message on quality. Price difference is obvious, but in reality different service providers offer different levels of quality. I would be wary of a purely virtual market place driven economy where all services are ranked at the lowest cost of delivery. Since service, unlike physical goods, is intangible and in the long term, price will always determine the level of service a user gets.
- swathes of real and often substantial difference remain in company law, tax and accounting. These are due to historic, cultural, language reasons, amongst others. It can be argued that the most levelling force on this is globalisation rather than legislation.
- mutual recognition of professional qualifications is desirable as a general objective. Some of the barriers to its implementation include:
- very different education systems prior to the qualification
- very different qualifications, both in extent, nature and market perspective
- some countries see qualifications as a passport (often the UK), others as a specialisation

ARB response to the Department for Business Innovation and Skills review of the balance of competences between the UK and the EU

The Architects Registration Board (ARB) is the UK Statutory Regulator for Architects, established by Parliament in 1997. ARB is an independent, public interest body and our work in regulating architects ensures that good standards within the profession are consistently maintained for the benefit of the public and architects alike.

Our duties are contained in the 1997 Architects Act, and cover five main areas:

- Prescribing – or 'recognising' - the qualifications needed to become an architect
- Keeping the UK Register of Architects
- Ensuring that architects meet our standards for conduct and practice
- Investigating complaints about an architect's conduct or competence
- Making sure that only people on our register offer their services as an architect
- Act as the UK's Competent Authority for architects

We welcome the opportunity to respond to the Department of Business, Innovation and Skill's call for evidence on the balance of competences between the UK and the EU in relation to the free movement of services in the Single Market. Our response is directly drawn from our experience as a UK Regulator and as the nominated competent authority for architects for implementing EU legislation related to the free movement of professionals. In this context, we collaborate and exchange best practice with European stakeholders such as the European Network of Competent Authorities for Architects (ENACA) and the Architects Council of Europe (ACE).

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Call for evidence questions and ARB response

1. What do you see as the advantages and disadvantages of EU action on the free movement of services? How might the national interest be served by action being taken at a different level (for example, at the World Trade Organisation level, or at the national level), either in addition to or as an alternative to EU action?
No comment.

2. To what extent do you think EU action on the free movement of services helps or hinders UK businesses?
No comment.

3. To what extent has EU action on the free movement of services brought additional costs and/or benefits when trading with countries inside and outside the EU? To what extent has EU action on the free movement of services brought additional costs and/or benefits as a consumer of services?
No comment.

4. How well, or otherwise, have the EU's mechanisms for delivering the free movement of services worked?
Although numbers are low when compared to the 'main' Register of architects (Part 1 of the Register), the Register for those providing temporary and occasional services (Part 2 of the Register) is gradually becoming more known. The UK is one of the key EU Member States which has received high numbers of European architects wishing to join Part 1 of our Register. An average of 400 EU migrants join Part 1 of the ARB Register on a yearly basis, and this represents approximately one third of all applications per year.

5. In your experience do Member States take a consistent approach to implementing and enforcing EU rules, or not?

The Architects Registration Board (ARB) is responsible for implementing the provisions relating to architects under Directive 2005/36/EC on the mutual recognition of professional qualifications and Directive 2006/123/EC on Services in the Internal Market in the UK.

ARB has screened its internal processes applying to EU migrants to ensure compatibility with Directive 2005/36/EC and Directive 2006/123/EC. Applications for both establishment and to provide temporary and occasional services may be made online, electronically or in traditional hard-copy form. It is difficult to establish whether all Member States have adopted a similar approach with regard to the application system for recognition of qualifications.

However, ARB is aware that there have been issues in relation to the implementation of the Mutual Recognition of Professional Qualifications Directive (Directive 2005/36/EC), and that there have been issues relating to the misinterpretation of the Directive, by other EU Member States' competent authorities for architects.
Under the principle of automatic recognition of qualifications, those who hold qualifications listed under Annex V.1.7 of the Directive and have met the national requirements for access to market in the state of award are eligible to register (access the market) in another Member State without further conditions.
In some instances, UK architects who held listed qualifications and met the requirements to register in the UK, have been required by the authority of another Member State to undertake additional examinations in order to meet the access to market requirements of that country. This has created some barriers to free movement of appropriately qualified individuals from the UK as the decision of the authority extended beyond the provisions of the Directive.

Clearer and more enforceable guidelines for the implementation of the Directive circulated to competent authorities could help in encouraging a more harmonised application of the rules. Appropriate opportunities to brief competent authorities could also be found by the European Commission for example.

Difficulties in relation to implementation also exist when recognising qualifications under the Directive's general system (when the automatic recognition of qualifications does not apply). A more systematic and harmonised approach could help in checking the comparability of qualifications, thus facilitating the free movement of professionals in the Internal Market.
In addition, more could be done in relation to the Member States' responsibility to update the list of qualifications under Annex V.7.1 in order to preserve migrants' rights to automatic recognition, and ensuring that the qualifications they are responsible for are accurately listed in a timely way.

6. Do you think the UK's ability to effectively regulate cross-border provision of services would be better, worse, or broadly the same, as the result of more or less EU action?

Please refer to our answer to Question 5.

7. What future challenges/opportunities might we face in the free movement of services and what impact might these have on the national interest? What impact would any future enlargement of the EU have on the free movement of services?

It is difficult to predict the impact of any future enlargement of the EU on the operation of free movement of professionals and services. In relation to architectural services, several factors would need to be considered, for example the size or proportion of architects per inhabitant in the country.
However because ARB receives a significant number of applications from EU migrants wishing to access the profession of architect in the UK, we can assume that future enlargements will enhance that trend.

With regard to the free movement of professionals facilitated by the recognition of professional qualifications, we have identified the following challenges:

- The negotiation of EU free trade agreements and of mutual recognition agreements (MRA) between the EU and third countries are likely to be significant as the architect profession is mobile internationally. Organisations such as the Royal Institute of British Architects may be able to provide further information on this subject. It is however important that national standards of education and training are maintained.

- Institutions are increasingly developing partnerships with other institutions in the EU. The emergence of joint degrees for example could represent a challenge with regard to accreditation/validation processes at national level and regarding processes of EU recognition of qualifications.

- Directive 2005/36/EC has now been modernised. There will be challenges for the UK regarding the transposition and implementation of the new rules. The new minimum training requirements are more reflective of the current UK system than those set by the original Directive. However, it is yet unclear how the new provisions will impact on ARB's resources. Regarding the introduction of the European Professional Card (or E-certificate), ARB and its European counterparts agree not to adopt this alternative system for processing applications for recognition of qualifications, as it is optional under the new Directive and does not present immediate benefits for European architects.

- The involvement of stakeholders in the EU decision-making process. With the development of implementing and delegated acts, it is not clear how stakeholders such as ARB will be consulted. There is a risk that decisions which might impact on ARB's processes and on British architects are taken without adequate consultation of the relevant parties.

8. Is there a case for more EU action to ensure that assessments for proportionality and necessity are more consistently interpreted? [see paragraphs 22 and 27 for more detail]. Or should the competence to assess these remain with Member States, as is the case now?

No comment.

9. Should decisions affecting the integrity of the Single Market be taken by all Member States and apply equally to all, or do you believe it is possible to take further liberalising action either unilaterally or with a selection of other Member States, whilst maintaining the integrity of the Single Market?

With regard to the free movement of professionals, it is possible that unilateral or selective liberalisation of regulatory frameworks could lead to a lack of clarity for migrants. Their expectations may be difficult to manage where some Member States may not have liberalised their access to market requirements for example.

10. What do you see as the advantages and disadvantages of EU action on the mutual recognition of professional qualifications (MRPQ)? To what extent do you believe that the cost of existing or future European rules in this area is proportionate to the benefits?

The implementation of the Professional Qualifications Directive (2005/36/EC) has enabled architects across the EU to use their home qualifications to secure registration in other Member States.
The Directive has removed some administrative obstacles to recognition of qualifications and registration by aligning minimum training requirements at EU level. Those who hold qualifications listed in Annex V.7.1 of the Directive can benefit from automatic recognition of their qualifications as they have met the EU minimum training requirements. Similarly, architects from acceding MSs are also eligible to have their qualifications recognised under acquired rights arising from Annex VI of the Directive.

The Directive was transposed into the Architects Act 1997 in 2008.
The listing of EU-recognised architectural qualifications includes over 40 UK qualifications. UK architects who hold these qualifications can benefit from the automatic recognition of their qualifications (i.e., their qualifications do not need to be assessed for equivalence). If they hold a UK Part 3 qualification (obtained after completion of practical training and examination) making them eligible to access the market in the UK, they are automatically eligible to register in any EU Member State without the need to pass additional examinations, subject to nationality requirements.

EU competence in this area makes it easier for UK architects to work in other EU Member States, as they can have their UK qualifications recognised. This means that they do not need to re-qualify in the Member State they move to.

From 2007 to mid-2013, ARB granted registration to over 2800 (non-UK) architects under the provisions of the Directive. In comparison, during the same period ARB granted registration to over 6000 UK architects.
Since 2007 and until 2012, and despite a peak of applications for registration in 2008, the number of applications from EU architects on the Register has remained an average of 436 applications per year. In comparison, the average number of UK applicants in the same period was 920 per year.
ARB does not specifically monitor the movement of UK professionals, but does receive occasional feedback from those who have moved and exercised their rights under the Directive. However between 2007 and 2012, more than 600 registered architects (who hold ARB-recognised UK qualifications) have required from ARB the production of a certificate demonstrating compliance of their qualifications with the requirements of the Directive. This certificate helps registered architects to benefit from the automatic recognition of their qualifications and to secure registration in other Member States. Not all competent authorities in other Member States require this UK certificate so the number of architects who move from the UK may be higher.

The revised Directive due to enter into force in early 2014 continues to set minimum training requirements for architects. ARB believes that Member States should continue to retain the ability to set higher national standards of education, in order to reflect national needs and legislation, and in particular to have the flexibility to determine the structure and duration of architectural education. This does not create obstacles to EU mobility but encourages diversification and recognises national and cultural differences.

11. What do you see as the advantages and disadvantages of EU action on company law? To what extent do you believe that the cost of existing or future European rules in this area is proportionate to the benefits?

No comment.

12. What do you see as the advantages and disadvantages of EU action on public procurement? To what extent do you believe that the cost of European rules in this area is proportionate to the benefits? What is your view of the effect on the defence sector?

No comment.

13. Are there any general points you wish to make which are not captured above?
No comment.

January 2014

ACCA welcomes the opportunity to comment on the call for evidence issued by BiS. The ACCA Global Forum for Business Law has considered the matters raised and their views are represented in the following.

SUMMARY

As a global body, ACCA welcomes the proactive and objective review of the principles and operation of international legislative cooperation and coordination. Whatever the future of the institutions and mechanisms of the EU, debate founded on sound evidence and clear principles will be the most fruitful course to improvement.

The UK's relationship with the EU has often been difficult, but this is in part a reflection of the distinctive characteristics of the UK which make it so important and valuable a member of the EU. The freedoms of its corporate and business laws, and their alignment with systems in other Anglophone nations around the world can isolate it from the other Member States, but are at the same time the foundation of its role as a global services centre, and conduit for business and investment into the EU for the mutual benefit of all concerned.

Free movement of services will be a growth area with the move to a digital economy, and enhanced ease of cross-border transactions. At the same time, aspects such as the mutual recognition of professional qualifications are inextricably linked to the free movement of persons, and freedom of establishment. While a consistent and light touch approach to the regulation of service provision is key to both internal economic growth of the Union and its attractiveness as a forum for external business to invest, there are significant consumer protection issues which need to be addressed in the field of accountancy and related legal and financial aspects of advice which may be given.

SPECIFIC COMMENTS

What do you see as the advantages and disadvantages of EU action on the mutual recognition of professional qualifications (MRPQ)? To what extent do you believe that the cost of existing or future European rules in this area is proportionate to the benefits?

ACCA is the competent authority for the protected title of 'Chartered Certified Accountant' under the Recognised Professional Qualifications (RPQ) Directive,

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and a delegated authority for the role of 'Registered Auditor' under the Statutory Audit Directive. This directive covers the mutual recognition of statutory auditors but refers to the RPQ Directive for certain other requirements that need to be followed.

In principle, the EU action on the mutual recognition of professional qualifications is advantageous for EU members. Without the Recognised Professional Qualifications Directive, it is likely that there would be far less cooperation between the professional bodies to allow direct routes to membership for EU citizens. As a result, artificial barriers would hinder the movement of professionals in the EU. The same applies to statutory auditors under the Statutory Audit Directive.

Some of the problems of the directives in practice are summarised below.

1. Implementation

As with implementation of any strategic plans made at a high level, the transposition of the directives into the domestic legislation of each member state, and resultant administration, can lose some of the intended benefits, meanings and outcomes. Ultimately the professional bodies are the end administrators of the RPQ and Statutory Audit Directives, and their distance from the initial EU legislative action results in confusion and a variety of levels of understanding of the requirements they are obliged to meet. It may be helpful if a more centrally focussed body that had a high level understanding of the EU legislation provided more support in the implementation of the directives in each member state.

2. Regulation

Defining and comparing the level of regulation of a profession between member states, particularly when there are 'regulated titles' can be complex. The UK has published a list of "regulated titles" including that of the ACCA and it would be helpful if the other EU member states followed suit.

The RPQ Directive covers accountants who are not auditors. However, the concept of accountants who are not auditors or at least in public practice is not widely understood in most EU countries. Therefore, applicants under this Directive are minimal.

Attempts to devise common training platforms for auditors or accountants are not helpful. They take a long time to produce and are difficult to update. Reaching consensus across many member states is also difficult. For example,

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an attempt by a group of professional bodies to create a common training platform has resulted in 'gold-plating' with additional requirements to the directive requirements.

Registration by a professional body such as ACCA in the UK is sufficient to provide a database of Chartered Certified Accountants and Registered Auditors for mutual recognition purposes across the EU. This means there is no need for a "European passport/professional card" for bodies such as ACCA. Similar arrangements, however, are not always in place in other EU countries.

3. Administration and Cost

In the case of the RPQ Directive, the actual work to administer the individual applications for recognition, and carry out evaluation of other professional body qualifications lies with the professional bodies. There are a large number and variety of professional bodies which are heterogeneous by nature, can be large or small, possibly recognised in domestic statute, hold a regulatory role, or not be accredited at all.

There are, however, only a handful of applications are made each year in the audit and accountancy field. This is not primarily because of artificial barriers but because of the need to master tax and law of another country and in a foreign language.

The time taken by ACCA to review applications can be costly due to the general complexity of trying to understand our obligations and how best to support the applicant. The costs, however, of mutual recognition tests in tax and law and keeping detailed records is not excessive. In the case of detailed records these are already held by ACCA.

The EU action to provide the Internal Market Information system for professional bodies to communicate with each other is useful to overcome the language barriers. However, there are some costs of translation that fall to the professional body or the student depending on the circumstances.

4. Competition

Professional bodies operate in many different industries with different dynamics. Professional bodies operating in the same industry are also competitors which can sometimes hinder discussions between professional bodies to engage in recognition agreements.

ACCA has found that some professional bodies can hinder the implementation of the Directives by requiring more information than is strictly necessary, e.g.

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asking for a full translation of the home country's syllabus when the only test required is in tax and law and that of the host country anyway.

"How do we achieve a reduction in the number of regulated professions without compromising on quality or consumer protection?"

Some member states, such as Poland, will be able to reduce the number of regulated professions in their country due to the large amount of existing regulation in a number of professions that do not impact public health or safety. There will always be a level of regulation required in certain professions to protect the public. Where regulation is required, the goal would be to ensure the required regulation is appropriate and effective. The profession of statutory auditor is regulated to protect the public. Other types of accountants are not regulated in the UK but certain types of accountants (e.g. tax accountants) are regulated in some EU states. De-regulation may be appropriate in some cases.

What do you see as the advantages and disadvantages of EU action on company law? To what extent do you believe that the cost of existing or future European rules in this area is proportionate to the benefits?

While there is a general feeling among those consulted that EU action on company law is a good thing and to be promoted, historically action has often preceded political agreement, with the result that initiatives have tended to bog down and flounder. From a commercial perspective group structures tend to be aligned to tax authority definitions, and unless and until tax is fully aligned across Europe, difficulties around group structures will persist. However, while tax remains a matter of national sovereignty within the Union that unresolved tension preventing full freedom of movement for services is inevitable.

There has been a shift in recent years from the principal function of the harmonisation being creditor/stakeholder protection, to a focus on the creation of a legal framework which allows for efficient business practice. The effect is that harmonisation measures are no longer designed so much as a countermeasure against potentially harmful side-effects for stakeholders of free movement of services, and are instead being actively pursued as a means to promote that free movement. Such an approach allows for more freedom on the part of Member States, and reduces the need for the EU to attempt to reach agreement on difficult issues such as board structure, and whether a one or two tier board structure is preferable.

However there is a lack of appetite to use the existing European corporate forms (due in part to the difficulties around tax mentioned above) and it seems very much the case that business prefers the structures it knows and understands.

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The perceived benefits of the EU structures are not yet outweighed by the direct costs and potential risks of adoption.

To what extent has EU action on the free movement of services brought additional costs and/or benefits when trading with countries inside and outside the EU? To what extent has EU action on the free movement of services brought additional costs and/or benefits as a consumer of services?

The impact of EU action on movement of services was felt to be very much dependent upon the purchaser; in the field of legal services, structures drive the demand for services. The success of insurance as a market was highlighted by those we consulted, and the possibility that pensions would be the next growth area in pan-European trade.

The status of the EU under the TFEU to negotiate on behalf of all Member States is conferred by Art 3. The benefit to all Member States of third nations being able to rely on a consistent treatment throughout the EU is clear, and to that extent EU action brings benefits in respect of trading outside the Union. However, from a UK perspective there are a number of areas in which agreement at an EU level, and in particular within the Eurozone, results in clear difficulties for the UK's domestic interests.

The UK is a significant provider of services both within the EU and as a part of the global economy. It has long been the case that the UK's unique relationship with both its geographic neighbours and Anglophone nations around the world has given it a significant advantage in world trade. As such, while there is significant value to the UK in being a part of the EU negotiating bloc, it is also essential to the UK's interests that it retains the ability to negotiate independently, and this must influence the approach to the competence of the EU in matters relating to provision of services.

However, it is clearly the case that the UK's unique position has also led to the development of a unique economy, and many of the features which contributed to the strength of the economy, and the mindset of business, differ from other parts of Europe.

As a result, there have been instances of EU legislation being implemented which deals with clear issues relevant to other parts of the EU which do not arise in the UK. Indeed, the 'medicine' needed to cure the ills of some Member States is a 'poison' to the UK economy. The negative impact on the UK economy of for example the Agency Regulations highlights the shortcoming of current impact assessment processes in the EU. In the field of services in particular, which are so important to the UK economy, and in which the UK is so fundamental a part of the attractiveness of the EU to other global investors, it

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is crucial that to the extent regulation is undertaken by the EU rather than at domestic level it nevertheless takes the interests of the UK properly into account. While it is important to have a level playing field across Europe, it is equally important that that field is not set in such a way as to materially disadvantage the UK's current pre-eminence in the global economy; to do that would weaken Europe as a whole to the ultimate net benefit of no one within the Union.

A particular element of concern in the impact assessment process for the EU is the tendency of impact assessments to be undertaken once at the very beginning of the legislative proposal process, but then not updated despite significant revisions to the proposals. In many cases the changes to the proposals are so far reaching that they merit comparative revision of the impact assessment itself.

In your experience do Member States take a consistent approach to implementing and enforcing EU rules, or not?

The reported experience of our members on consistency is, regrettably, consistent in finding the implementation of EU law to be patchy and inconsistent, both between and within individual Member States. There was felt to be a lack of evidence that the EU follows up on effective transposition of Directives. There is a perception of an uneven playing field between Member States, with the gold-plating of Directives a particular concern. The bulk of Level 1 legislation is too bland to be effective when transposed, but the level of detail inherent in Level 2 measures is such that countries are finding it hard to keep up with the amount of material generated by the EU.

It is certainly the case that implementation of the mutual recognition provisions is inconsistent, and the extent to which professional bodies have embraced the principles behind the underlying directive has varied, with the result that UK professional bodies can find themselves in a position of extending recognition to practitioners from States where reciprocal recognition for a UK recognised professional is not (and could not be) available. Whether the driving policy goal behind mutual recognition is stakeholder protection or business facilitation, an inconsistent approach to application is incompatible with effective implementation.

The application and enforcement of Regulations is equally an area of concern, as domestic courts will inevitably apply local jurisprudence to aspects such as the extent of tortious liability or definitions of negligence. The potential tensions arising are not necessarily dealt with by reference to the European courts, as the justices and Advocate General considering the matters raised may be familiar

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with neither the traditional approach of the enforcing jurisdiction nor (in cross border cases) that of the complainant and the resulting reasonable expectations of the parties which deserve protection. Such issues are of course by no means unique to the provision of services, but are nevertheless a concern and should be addressed.

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BALANCE OF COMPETENCES: SINGLE MARKET: FREE MOVEMENT OF SERVICES REVIEW

DEFENCE PROCUREMENT

*QUESTION 12. What do you see as the advantages and disadvantages of EU action on **public procurement**? To what extent do you believe that the cost of European rules in this area is proportionate to the benefits? What is your view of the effect on the **defence sector**?*

The creation of a level playing field for competition in the EU should be beneficial to competitive companies, not least from the viewpoint of a UK company which has faced more competition in its home public procurement markets than is common in comparable Member States.

Ten years ago, EU regulation of defence procurement was almost unthinkable. Today, following implementation of the Defence and Security Procurement Directive (DSPD) (2009/81) in 2011, it is a reality. But it is still in its infancy, given the long cycles of defence purchases and it is too early to offer significant evidence as to its effects. That said, it does have a number of impacts that merit comment.

This Directive is the first instrument in Europe (and, indeed, the Western world) to have legally binding effect on cross-border defence procurement. A number of attempts were made in the past to encourage defence trade between Member States (eg. the Anglo-French Reciprocal Purchasing Arrangements of 1988; the EDA Code of Conduct on Competitive Purchasing, 2005). None of these inter-governmental arrangements had real effect, and there is no evidence to suggest that, in the absence of a Directive, Member States would operate more open defence markets. The introduction of internal market disciplines and the eventual enforcement of EU legislation may prove historically to have been the most important single act to develop a cross-border market in defence goods and services.

We offer two broad observations on the DSPD, first concerning its impact on procurement policy, and second concerning the development of EU competence as a result of that Directive and the Intra-Community Transfers Directive (2009/43).

Effect on Procurement Policy

The DSPD was designed to address certain specificities of defence and security markets, and can broadly be said to have done so. Use of negotiated procedures as the default method of procurement, exclusions for certain types of international cooperative programmes, and recognition of security of supply as an award criterion are important and necessary innovations in EU procurement law. Nevertheless it may have certain perverse effects: for example, the requirement that contracts for production of equipments developed under separate prior contract be open for international competition may have negative impacts on the industrial base (industry develops technology to produce and not as an end in itself) as well as on the propensities of governments and companies to invest in new technology. For the UK, which accounts for over one-third of defence research and product development investment in the EU, this is a significant issue, with potential consequences for sovereign military capability, the technology base, and future exports.

There is also a question-mark over whether the DSPD and EU public procurement law more generally adopt the right approach to complex procurements. In essence the directives aim to find ever more potential suppliers to meet a requirement on the basis that additional competition will drive down price and result in best value for the procurer. The metric of numbers of bidders is often used as a proxy for competitiveness of a market.

This approach may work well in commoditised markets. However defence markets are rarely commoditised. The cost of re-qualifying a safety-critical component will usually outweigh any saving that can be made by finding a new supplier. If a component is being procured just-in-time, then the programme risks of using an untried new supplier outweigh potential savings against an established incumbent. The focus is therefore much more on outputs than on purely competitive supplier selection. Competition is an important tool in defence procurement, but so too are accreditation, relationship management, track record, and continuous improvement.

This tends to drive industry procurement to aggregation of demand, procured through partnerships rather than through sequential competitions. This reduces supply chain risk, lowers transaction costs and drives economies of scale. Such arrangements can be formal, akin to the framework agreements of the Directives, or less formal through accredited supplier lists, or business agreements. This approach is also extended to commodities. By aggregating demand at the highest level, in addition to cost reductions, value added services can be introduced, such as stocking or delivery to line.

Although such approaches are not proscribed by the EU public procurement approach, the directives are written around a different philosophy, and so encourage a different way of thinking. Embedding an output oriented, principles based strategic approach[1] to public procurement would drive more flexibility and effectiveness into defence procurement, than focussing on ever more detailed rules on supplier selection. In the context of competence, it is reasonable to ask whether the UK, with a creditable track record in public procurement methodology, would have and would in future evolve smarter and less constrained approaches to procurements in sophisticated and complex markets than the EU philosophy naturally encourages.

Finally, we would observe that the DSPD is subject to a number of legal uncertainties – for example in relation to interpretation of Art 346 TFEU[2] and to the position of various exclusions in relation to other overarching Treaty law. Harmonisation is a necessary support to legal enforcement in the field of public procurement and can bring significant benefits if all parties play the game, but it is also subject to unpredictable decisions in courts which, from case law we have observed in other sectors, do not necessarily coincide with the political intent of the legislator. Apart from creating some uncertainties today, this also leaves open some major questions about the possible impacts of the legislation.

Development of Competence

Intra-EU trade in defence and security goods and services was historically conducted outside the framework of the Internal Market. Member States in practice tacitly invoked Art 346 in relation to

[1] eg see http://www.youtube.com/watch?v=mGLheZVBvH4
[2] Art 296 prior to introduction of the Lisbon Treaty

most defence procurements, and export control processes were a national responsibility. The Commission's Interpretative Communication (COM(2006)779) and the DSPD have effectively extended the ambit of the Internal Market into the defence and security sectors, although Member States may continue to use Art 346 where strictly justified. In regard to export control, the Intra-Community Transfers Directive (ICTD) (2009/43) provides for common licensing processes in Member States, who retain jurisdiction on export control decisions, subject to the Council Common Position of 2008 and to EU embargoes.

Both these measures provide harmonisation and were transposed into national law in mid-2011. (It is worth noting that Directive 2009/43 was inspired by UK practice, as developed under the Export Control Act 2002.) It is too early to assess their effect, both in the UK and in continental markets, and they have yet to give rise to specific case law.

But it is instructive to review how the introduction of the legislation came about, and to examine its broader impacts on EU competence, and to consider whether these were properly understood when the legislation was under consideration. The chronology was:

- In 1996 and 1997 the Commission produced two Communications (COM(96)10 and COM (97)583) on defence-related industry. The larger Member States made known to the Commission that they did not consider the EU had a role to play.
- In 2003, a new Communication (COM(2003)113) was published which stated that the Commission intended to "continue its reflection on the application of competition rules in the defence sector" and to launch an impact assessment with a view to developing a legal instrument to introduce a simplified European licensing system for intra-community transfers of defence products.
- A Green Paper consultation was initiated in 2004 highlighting inconsistencies in EU procurement law and the perceived abuse of Art 346 TFEU in relation to most defence procurements, and suggesting an Interpretative Communication of Art 346 and/or a Directive specifically tailored to the needs of defence procurement. Having received a range of opinions, the Commission decided to proceed with both, with the results published in COM(2005)626.
- In December 2006 the Commission published an Interpretative Communication (COM(2006)779) explaining the strict and limited basis on which the Art 346 exemption could be used, with the onus on Member States to justify such use
- In 2007, the draft DSPD and ICTD were published, and adopted by Council and Parliament after first reading in 2009.

The plan was well conceived and executed, and sat in a wider context where, on one hand the development of then European Security and Defence Policy was underway, and on the other the Union and the Commission were opening new boundaries in sectors close to defence – notably action to address civil security challenges (eg the 2003 Security Strategy and work to prepare the 2009 'Stockholm Programme') and the introduction of a security research theme in 2007 in the Commission's Framework 7 programme.

The ICTD was a more modest outcome than the idea, originally expounded by Commission officials, that export control policy for intra-community transfers should also be harmonised.

Representations by Member States and industry stopped that development, which would have given the Union a specific competence with regard to the movement of defence goods within the EU and hence in matters of export control policy, notwithstanding the provisions of Art 346 TFEU which reserve competence in defence trade for Member States.

And yet the Commission asserts today that it has developed a competence in defence trade matters. Case law (AETR, 22/70, judged in 1971[3]) effectively allows that the acquisition of a specific competence in the single market (defence procurement and defence transfers) when coupled with an exclusive competence (external trade) extends the domain covered by the exclusive competence into areas hitherto proscribed. We have therefore seen two extraordinary developments in 2013 which demonstrate this evolution of competence: (a) the Commission proposed in the draft negotiating mandate for the EU/US Transatlantic Trade and Investment Partnership that defence and security (as defined in Directive 2009/81) be specifically included in the chapter concerning public procurement; (b) having sought (unsuccessfully) a seat (rather than observer status) at the UN Arms Trade Treaty, the Union has nevertheless insisted, with Member State agreement, that it is the responsibility of the Commission to invite Member States to sign the Treaty. The European Parliament has been invited also to give an opinion.

So, while it is too early to give a clear view on the advantages or disadvantages of the two directives, there appears to be little doubt that a consequence of this action in the single market has been to extend substantially Union competence into the sphere of defence external trade. This was not explicitly addressed during the legislative process. UKTI figures show the UK accounted for approaching 50% of EU defence exports across the 10 years to 2011; and they make up significant proportion of national exports and are an important component of the growth strategy and of foreign policy. Our national interests in defence trade are therefore substantial, and we have no interest in ceding competence in this area.

The experience suggests that there is too much compartmentalisation of subjects when legislation is addressed, and that the impact of case law is, in some areas at least, insufficiently understood among officials and other legislators. There is a strong case for requiring that impact assessments make explicit the indirect consequences of legislative proposals arising from case law, the Treaty or other sources; and that HMG should undertake a similar and transparent exercise at the outset of new legislation.

January 2014

[3] See http://www.cvce.eu/obj/judgment_of_the_court_of_justice_aetr_case_22_70_31_march_1971-en-0d4dae9f-514b-47e0-bd49-502318d6e798.html

Bar Council response to the Review of the Balance of Competences: Free Movement of Services

1. This is a response by the General Council of the Bar of England and Wales ("The Bar Council") to the Government's review of the balance of competences as between the EU and the UK in the area of the Free Movement of Services, published in October 2013.

2. The Bar Council represents over 15,000 barristers in England and Wales. It promotes the Bar's high quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.

3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of criminal and civil courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board.

4. The Bar is not proposing to respond to all elements of the call. Thus, though we do not reply to each of the proposed questions in turn, we have addressed most of the issues raised by those questions in this text.

5. A comprehensive analysis of the impact of EU action on the market for services would require a breadth of knowledge or empirical analysis which it is not for the Bar Council to provide. Rather, in this response we make a few preliminary remarks and then focus on three areas of EU regulation affecting services and make various observations directed to those areas. We then provide short answers to the questions set out in the Call for Evidence. We focus on the success story that is the free movement of legal services in the EU to date, noting our concerns about its review, and then add a few broad comments in the area of company and insolvency law, and public procurement. This submission does not address the regulation of financial services as that is the subject of a separate call. In considering the overall relationship between the EU and UK in services one would want to take account, also, of developments in that important area.

6. In general terms it seems to be accepted in government that free movement of services is desirable and there is only so much more that can be said in this regard. To take one example to stand for the many, we note that on 20 February 2014, the Department for Business, Innovation and Skills was announcing the importance for the UK economy of the opening up of the online music services market by the adoption of the Collective Rights Management Directive. Presumably the UK's position would be therefore that broadly speaking the correct balance of competences would enable the most effective opening up of service markets such as these. The questions posed in this call for evidence include the following:

> *What do you see as the advantages and disadvantages of EU action on the free movement of services? How might the national interest be served by action being taken at a different level (for example, at the World Trade Organisation level, or at the national level), either in addition to or as an alternative to EU action?*
> *To what extent do you think EU action on the free movement of services helps or hinders UK businesses?*
> *Do you think the UK's ability to effectively regulate cross-border provision of services would be better, worse, or broadly the same, as the result of more or less EU action?*
> *Should decisions affecting the integrity of the Single Market be taken by all Member States and apply equally to all, or do you believe it is possible to take further liberalising action either unilaterally or with a selection of other Member States, whilst maintaining the integrity of the Single Market?*

7. It seems to us that government answers these questions for itself on a repeated basis. The example of the Collective Rights Management Directive is a good example. EU action is available now. The possibility that WTO might do something in the future is not a reason not to engage with the EU. It is hard to see how it can possibly be supposed that the market access achievements of the single market could be delivered by unilateral action by the UK. If it is desirable that the market in services be opened up, then the only practical means of achieving and defending this is by means of collective action. By definition a market that comprises only some EU countries is not the single market. Market access amongst a smaller group may be better than no access at all, but in most cases we suppose that it must be less desirable than the full EU-wide single market.

I. Free Movement of (legal) services

The Significance of Legal Services for the UK Economy

8. Plainly the successful operation of a market for legal services is of direct importance to the Bar. However, the successful operation of this market is important not just for the legal profession but brings with it important benefits for society and the UK economy. The Bar has always been a committed supporter of the development of an effective internal market in legal services, for this is to the benefit of the UK as a whole.

9. The global legal services market has seen significant growth over the past decade as a result of increasing international trade and growth in developing economies, which has led to an increase in demand for legal services and the UK has had the largest share of the European legal services market. This is largely due to the popularity of the English common law in international commerce as well as the expertise and professional integrity of our

judges and lawyers. The sector was worth £20.4bn or 1.5% of UK GDP in 2012. A substantial contribution to this is made by the continued demand by parties from the EU for the use of London as a venue for litigation and arbitration.

10. Secondly and much more important for the EU economy than growth in the legal sector itself is how legal services underpin the rest of the economy both in relation to imports as well as exports. As leading economist George Yarrow has pointed out in a recent study:

> *"Economic analysis and evidence suggests that legal services can have wide ranging economic significance through their very close connection with the general institutional architecture of society (sometimes encompassed by a term such as the 'rule of law'). Moreover, this analysis and evidence suggests that it is not by chance that good economic performance tends to be closely associated with the stable and well-functioning legal systems. Rather the institutions (including laws and norms) of a legal system condition and determine economic performance. Institutions that are stable and credible facilitate economic development and lead to higher levels of economic activity. In addition, although political institutions determine important aspects of the structure of a legal system, and whilst the judiciary determines how given laws are implemented, lawyers actively contribute, through their everyday actions and conduct, to both the shape of a legal system and how effectively it operates and functions."* [1]

He continues later saying,

> *"a particularly important relationship between legal services and economic performance stems from the roles that legal services play in facilitating and sustaining markets. The core activity of the professional legal services sector tends to expand market activity throughout the economy, and it is therefore closely linked to economic performance and growth; a feature that distinguishes legal services from a number of other professional service activities with which they are often compared in economic and policy assessments."*

The Internal Market for Legal Services

11. The profession of lawyer is the only (liberal) profession that is covered by a separate system of Directives governing the free movement of practitioners within the EU:

- The **Lawyers Services Directive** - 77/249/EEC of 20 March 1977, [1977] OJ L 78, governing the temporary provision of services and
- The **Lawyers Establishment Directive** - 98/5/EC of 16 February 1998 [1998] OJ L 77/36, which provides for establishment under home country title, with the option to integrate into the host country's profession after 3 years.

This so called "Lawyers' Regime" specifically employs a unique mechanism of mutual recognition, without (immediate) integration into the profession of the host Member State.

10. Besides the two Lawyers' Directives, lawyers have also been able to, and have in practice, made use of the general system of recognition of **Professional Qualifications**, governed by Directive 2005/36, which leads to full integration into the profession of the host

[1] 'Assessing the economic significance of the professional legal services sector in the European Union', Regulatory Policy Institute, June 2012

Member State. Under the PQD, to proceed to full integration, a lawyer must first successfully complete an aptitude test.

11. The Lawyers regime is widely seen to be an Internal Market success story, allowing practitioners to offer their services in other Member States on an occasional or long-term basis, based on mutual recognition. For the purposes of this response, we would add that, by extension, it is a good example of an appropriate balance of competence between the EU and the Member States.

12. It is also necessary to refer to the general **Services Directive** (SFD) adopted in 2006 (**2006/123/EC**), which was to have been implemented into Member State law by the end of 2009, though full compliance has even now not been achieved across the Member States. Although the **Services Directive** does not exclude lawyers/legal services from the scope of its application, in effect, European lawyers are only affected to a limited extent since it recognizes the prevalence of the sectoral Directives and Directive 2005/36/EC on the recognition of professional qualifications. This limited impact of the **Services Directive** is reflected in the recent decision of the Divisional Court in *Lumsdon v Legal Services Board* [2013] EWHC 28 (Admin), see paragraph 94 and following.

Current EU developments affecting the Lawyers regime

13. The Establishment Directive foresees its own evaluation and possible revision after 10 years of operation. The Legal Profession's default position, as manifested by the Council of the Bars and Law Societies of Europe (the CCBE) has been one of resistance to full legislative revision of the regime, hard-won as both directives were through the original EU legislative negotiations.

14. Against this background, DG Internal Market of the European Commission commissioned an independent study of the operation in practice of the Lawyers Regime directives, which was undertaken by Panteia, together with the University of Maastricht. The report, entitled "**Evaluation of the Legal Framework for the Free Movement of Lawyers"** (and known as the Panteia Study) was published in late 2012, and in the time since has been subjected to considerable scrutiny and debate. The study's overall assessment of the lawyers' regime is that it has been and remains necessary and relevant, despite the existence of complementary horizontal measures such as the PQD; and that for the most part, it has achieved its objectives of facilitating free movement of legal services.

14. Looking at its conclusions in a little more detail:

- As regards the **temporary provision of services** in other Member States by fully-qualified lawyers, the report finds that the **Lawyers Services Directive** has successfully brought down legislative and regulatory barriers, and any barriers that remain are inherent to the cross-border provision of services generally e.g. language, knowledge of local law and custom etc. It does recommend, however, amending Article 4 so as to do away with double deontology, in particular as regards Professional Indemnity Insurance, so that the home state insurance covers temporary service provision.
- As to the **Lawyers Establishment Directive**, the study again finds that it is working

well, but seeks to iron out some problems, notably to simplify and modernise administrative compliance, and do away with certain aspects of double deontology including relating to professional indemnity insurance; and iron out the problems that arise as a result of different national rules regarding in-house lawyers, alternate business structures and non-lawyer ownership.

15. The Bar is currently engaged, along with other national bars, in formulating a position on the possible revision of the lawyers' regime, in light of the Panteia Study. The work is being coordinated through the CCBE. It is not proposed to analyse in detail, for present purposes, the areas of contention. Suffice it to say that we will strive to ensure that any changes that may be necessary in order to adapt the existing regime to the changing market (e.g. the regulation of new legal forms; non-lawyer ownership of legal practices; greater use of information technology; double deontology; professional indemnity insurance; etc.) retain the flexibility and respect for national legal traditions that have allowed the regime to thrive to date, thus also retaining the appropriate balance of competence.

16. There are other current developments at EU level relating to the structure and regulation of the legal profession, which also go to the balance of competence issue, and about which the Bar would have significant concerns were the balance to shift inexorably towards the EU. The profession will be closely engaged as these go forward. A couple of examples:

- **Access to the liberal professions**

In October 2013, the European Commission adopted a communication announcing the start of an **evaluation of national regulations on access to regulated professions**. The Commission acknowledges that there are very good reasons for restricting access to certain professions (it cites consumer protection as an example) but is concerned that overly restrictive conditions for accessing certain professions may discourage or even prevent young people from entering the labour market. The Commission considers that improving access to professions, in particular through a more proportionate and transparent regulatory environment in Member States, would facilitate the mobility of qualified professionals in the single market and the cross-border provision of professional services. The legal profession is not singled out, and of course, enjoys a successful free movement regime, as outlined above, but we nonetheless would be concerned to see the EU becoming overly prescriptive in this area.

- **Judicial training**

The training of legal practitioners is also a topic on which the EU institutions have been active. Recent EU activity on the subject:

  - Commission Communication of 13 September 2011 entitled 'Building trust in EU-wide justice – a new dimension to European judicial training',
  - Pilot project on judicial training proposed by Parliament in 2011,
  - Comparative study on judicial training in the Member States commissioned by the European Parliament from the Academy of European Law (ERA) in consortium with the European Judicial Training Network (EJTN),

- EP resolutions of 17 June 2010, and 14 March 2012 and February 2013 on Judicial training, the most recent one suggesting the appointment of national court coordinators for European law and their interconnection at European level.

17. Overall, it seems that the steps taken towards creation of an Internal Market for Legal Services have had broadly positive effects for the UK, and it is difficult to see how they could have been implemented without conferral of the existing competences upon the EU institutions. It is not immediately obvious that there is a serious issue regarding the appropriate competences of the EU in this area.

II. Company Law

18. The Bar has been supportive of various specific EU Company Law initiatives over the years, but considers that the major overriding difficulty with EU action in this area that it tries to cover wide areas in Member States which range from the highly sophisticated, which are attempting to lead the world and to follow best practice as it develops outside the EU, to less sophisticated Member States. A one-size-fits-all approach simply cannot cover the different structures, markets, conflicting interests. Accordingly, in our positions on EU company law policy over recent years, we have consistently called on the EU to set up the right framework for regulatory competition, allowing for a high level of flexibility and choice; and calling for future work to focus on increased administrative cooperation and exchange of good practice, rather than further harmonization. We have also sought consolidation of EU company law directives with a similar scope.

19. The EU has made several attempts to create EU company legal forms, with rather mixed results. Whilst the Bar sees the attractiveness of providing workable alternatives to existing national company law forms, their uptake has varied wildly across the EU according to how attractive the model is in the different Member States versus the known and trusted national ones. As ever, no one wants to be the guinea pig adopting a novel form which is not, at least initially, widely understood and is frequently viewed with suspicion. There have also been well documented difficulties with legal base in this area, which we have dealt with in more detail in our response to the Synoptic Review of the Internal Market, to which we refer you. The Bar has tended to take the view that, provided such EU models exist in parallel with national models, leaving flexibility for companies to choose, there is no particular reason to object. For as long as that flexibility remains, there seems no objection to the current balance of competences, but the importance of retaining that flexibility is to be emphasised.

III. Insolvency

20. The conclusion regarding the need to maintain scope for flexibility at the national level can be repeated here. The Bar responded to the Commission consultation on the future of European Insolvency Law in the spring of 2012, in effect supporting the balance of competence as it then existed between the EU and the UK in this area. We expressed the view that Regulation (EC) No 1346/2000 on Insolvency Proceedings (setting down rules on jurisdiction, applicable law and recognition and enforcement of insolvency-related

decisions; as well as on the coordination of main and secondary insolvency proceedings) ("the Insolvency Regulation") in practice is generally effective and efficient. Inevitably, there have been issues as to its scope and effect. However, most of these have been satisfactorily resolved in our view, by the Court of Justice of the European Union (CJEU) and at national court level, in a manner which we believe is consistent with the aims and objectives of the Insolvency Regulation.

21. In anticipation of the revision of that regulation (proposed by the Commission in late 2012 (COD(2012)0360) and which is now passing through the European Parliament and the Council), the Bar endorsed the existing regime, but called for greater coordination and cooperation between jurisdictions in this area. On the issue of scope, we called for wording to the effect that the Insolvency Regulation applies to the insolvency proceedings referred to in Annex A, leaving it to individual Member States to decide for themselves whether certain procedures for which their national law provides should be included within Annex A. On the basis of the principle of mutual trust that underpins the operation of the Insolvency Regulation generally, it should not then be open to other Member States to look behind the list and determine for themselves whether proceedings in any given case constitute insolvency proceedings. While avoiding uncertainty, such an approach would also permit flexibility where appropriate. By way of example only, we cited the English scheme of arrangement as a flexible and useful restructuring tool. The fact that it does not fall within the Insolvency Regulation, however, has not meant that its flexibility or utility has been diminished. On the contrary, the availability of the scheme in relation to companies which have a sufficient connection with England & Wales (eg because the debt is governed by English law), whether their Centre of Main Interest (COMI) is elsewhere within the EU or outside the EU altogether, has worked to the advantage of creditors generally, as results have been achieved which would not necessarily have been capable of achievement under the law of their COMI. We observed that it would be regrettable if, by extending the ambit of the Insolvency Regulation, such flexibility were to be lost, with the likely consequence that creditors' interests generally would be adversely affected. Accordingly, schemes of arrangement should remain outside the scope of the revised regulation.

18. We note with regret that the European Parliament has recently adopted amendments to the proposal revising the Insolvency regulation that may undermine some of these key factors, removing the flexibility under the existing regime that worked to the benefit of the Member States, companies and their creditors. Were that to be upheld in the Council, we believe that it would bring about a significant and unwelcome shift away from national competence in this sensitive field.

19. We also await the Commission's next steps in its exploration of a possible harmonisation of substantive insolvency law. The Commission Work Programme for 2014 foresees adoption of a measure in the first quarter, which was expected to be legislative, though the Commission has more recently been indicating it is likely to be soft-law. We do not propose to go into this in detail here, but instead flag this as a topic on which again we would not welcome a shift towards centralised EU rules.

IV. *Public Procurement*

20. On 11 February 2014 the Council adopted three new Directives covering procurement of goods, works and services by public bodies and utilities and the procurement of concession contracts. These are very substantial legislative achievements and a detailed analysis of their content is beyond the scope of a short response such as this.

21. There are no doubt parts of the new legislation which represent an unwelcome extension of EU regulation, but it is understood that the UK is enthusiastic about this package and intends to implement these Directives well in advance of the date by which implementation is required. One can only infer from this that the UK government takes the position that the package is to be welcomed. Certainly, one would expect that as UK entities are significant providers of services throughout the EU, the UK would benefit from continued opening up of these markets. It does not seem therefore that there is a substantial issue regarding the balance of competences between the EU and UK in this area as matters currently stand.

22. There is however a further point worth making regarding the competences of the EU regarding procurement beyond the EU market. Much has been made by the EU and by the UK government of the promising opportunities in services exports that may flow from trade agreements entered into by the EU with countries such as Singapore, South Korea, Canada and perhaps also the United States. These agreements, in particular those regarding Canada and the United States, will have substantial effects on the opportunities for the export of services to those countries as they substantially expand the market available to EU suppliers beyond that provided for under the current WTO arrangements (under the Government Procurement Agreement).

23. UK exit from the EU in a few years' time would have, as a consequence, a rather startling effect. It is said by those who minimise the impact of exit that the UK would continue to benefit from WTO rights but that would involve a number of issues of the type raised by Scotland's proposed succession to the UK's rights in the EU. Even assuming that this is achieved, the UK would, by leaving the EU, be in a very much worse position than its former EU partners as they would have much improved access to public procurement and other service markets under the bilateral arrangements with the United States, Canada and the UK would be left whatever other arrangements it was able to negotiate afresh with those countries.

Bar Council
28 February 2014

The Other Strasbourg

Britain's Division of Competences Review: A View from the Council of Europe

The United Kingdom Government is currently engaged in an audit of the competences of the European Union, reviewing the impact of the EU treaties.

We are parliamentary delegates to the Council of Europe, with a vantage point reaching out across our shared continent. As such we have experience in models of international democratic cooperation.

It is not the first time members of the Assembly have offered their views to the debates and reviews on European integration involving the Treaty of Rome and its successors. During the Convention on the Future of Europe, several of our colleagues submitted a paper reflecting on the view from Strasbourg.[1] We follow in that tradition today.

A Tale of Two Europes

The Council of Europe predates the EU, predates the EC, and predates the EEC. It was founded in 1949 as a mechanism for intergovernmental cooperation across the continent. Delegates are selected from national parliaments, enjoying a more direct link with the electorate. There is no large civil service. There is no powerful community of Commissioners. Decisions are made collectively, rather than through qualified and complex weighted voting. The Council's budget is comparatively modest, rather than equivalent to that of a country in its own right.

As such, it operates on an entirely different model from that of the European Union.

We would suggest that in terms of simple cost efficiency and democratic accountability, the intergovernmental approach is better. A study of the attitudes of Britain's founding fathers of European Cooperation, especially Churchill and Bevin who both appreciated the long term direction of events, certainly underlines that view.

A History of Subversion

The European Union has long been assuming the mantle of the Council of Europe through assimilating its identity. It has seen it as a fight for sole legitimacy. The concept of a European anthem was first adopted by the Council, and picked Beethoven's Ode to Joy before it was subsequently adopted by the institutions of the Community. The current EU flag was created for the Council of Europe, and again hijacked by Brussels. An end symptom is that our institution has since had to design a new stand-alone European flag to distinguish our work from the cuckoo's.

This might be a minor annoyance except that the principle is symbolic. For an organisation that is so involved in fighting over intellectual property rights and copyright theft, the EU's approach is rather paradoxical. Yet the mentality is repeatedly one of the EU being the 'true' European cause which rides roughshod over the interests of members of the Council. Time and time again colleagues find MEPs who consider themselves as the sole democratic representatives of the continent of Europe on

[1] *The EU Convention, the Council of Europe and the Future of Europe*. Paper prepared by:
David Atkinson, MP; Baroness Hooper; Sir Sydney Chapman, MP; John Wilkinson, MP; Sir Teddy Taylor, MP

the international stage, mandated to draw more powers to themselves from member states and to represent the broader continent internationally. This, it has to be said, is largely because of the significant budgets that they already have such control over.

But we would encourage those studying the division of EU competences to delve into the historical archives held across government departments, and the discussions that were taking place over the decades on the relative roles of the two institutions. Indeed, we would recommend compiling these archives and putting them into the public domain.

The result will be to better appreciate the long term ambitions of those establishing the two types of institutions, where they led, the temporary nature of their setbacks and blocks, and how from today they will continue to expand in years to come. In the story of European cooperation versus integration, context is everything, and timelines explain the dangers of the future.

In that context, the Council of Europe provides a useful safeguard as the international forum of choice. We would encourage you to reflect upon the parallel of the role of the constitutional monarch in your democracy, or of the constitutional president in other systems. Such an individual fills a position without the ability to usurp power. Restoring the Council of Europe closer to a central role in continental cooperation similarly reduces the enduring threat of powers being taken away by a growing federal entity.

The Democratic Deficit

The Laeken Mandate was agreed by the EU's heads of government, as a response to a series of referenda in which those supporting further integration had been badly mauled. As a result of these votes, even the most ardent federalist had to admit that there was a clear disconnect between voters and their elected representatives.

That gap has continued and indeed got wider, as the reactions to the EU Constitution and the Lisbon Treaty showed. Meanwhile, a failure by a number of governments to address citizens' concerns over such issues as immigration, exacerbated in some cases by movement rights under the EU treaties, has contributed to an atmosphere in which extremist groups can more readily find support.

The Council of Europe was set up to avoid such tyrannies and extremisms from arising again. Our work in consequence is being undermined by the activities of the European Union.

Those speaking for European integration as a political project, aiming for full geostrategic integration, are often those least capable of claiming a mandate. European Commissioners are nominees to what amounts to a quango, typically appointed after completing a career in politics (meaning paradoxically that to qualify they have to have lost an election). MEPs are appointed on the basis of a party nomination, through a list system and a form of proportional vote, across a region or nation: this is problematic in that it does not generate a sense of ownership of the politician amongst "his" voters.

Meanwhile, the EU's Council of Ministers operates under a system that the Commission now estimates is 80% Qualified Majority Voting. Ministers may have to report back to their parliament to say that they wanted something but were forced to do something else by other countries, and there is nothing they can do about it. This palpable failure is consequently masked by a voting abstention.

Quite why anyone should be surprised that ordinary voters should feel outraged at their own impotence is a mystery. Once again, it encourages them to turn to anyone who can provide an answer, however extreme, because the EU system itself makes dishonest people out of those entering its politics.

By contrast, representatives from the Council of Europe are representatives of national parliaments and bear a far greater appreciation of grassroots concerns, public opinions and mood, and carry direct responsibility to a closer electorate.

Ever Closer Union

The EEC/EC/EU approach is based on the principle of countries gradually merging. Participating member states sign up to a political direction that simply does not exist in the Council of Europe model.

This means that for countries that do not wish to become part of a federal superstate down the line, or surrender more powers to central control and QMV, the EU model is a poor choice.

The Council of Europe demonstrates that this approach is not the only one on offer. Other economic groupings, particularly the EEA, EFTA and other bilateral deals between the EU and non-member states, show the economic alternatives also already available that do not carry so great a political burden. In particular, we would encourage revisiting the example of CEFTA and the Visegrad experience as a case study.

The EU treaties specifically cater for the existence of states and groups of states existing beyond its increasingly communal borders. Thanks to the 'Good Neighbour Clause' in the Lisbon Treaty, the EU for the first time recognises that over the long term it has a finite reach for expansion and that there is room for cooperating on a different, non-integrationist, level with countries it has not absorbed. This new development should be grasped with both hands.

Budgetary Blues

The budget of the EU is larger than the GDP of eleven of its member states; and larger than the government budgets of all but nine EU members, that is to say two thirds of them.

By contrast, the Council of Europe achieves what it does on a budget a tiny fraction of that. In practical terms, the entire spending of the CoE is the equivalent of *one half of one day's spending* by the European Union. The *total* figure runs to just the MEPs' admin costs for Strasbourg, including their (symptomatic) Brussels commute.

But management of this huge sum by the EU has been notoriously bad. For approaching two decades the EU's own Court of Auditors has consistently refused to sign off the vast majority of the accounts. OLAF, the in-house criminal investigation agency, is openly running a triage system because it can only handle a portion of the cases it itself gets pointed to. Parts of the budget have levels of misspending on a par with state social security spending, notorious as the worst part of national budget loss.

A key problem is one of propriety and property. To those dealing with "EU money" it has not come from any taxpayer, but been magicked out of thin air. There is no sense of ownership, nor guilt at any waste or loss.

We would encourage those undertaking the Review to consider the relative efficiencies that go with taking an intergovernmental approach, especially for a net EU budget contributor such as the UK. Duplication should be abandoned, and where it exists the preference should be away from a federal institution. Some fairly challenge the value for money generated by having a Congress of Regional and Local Authorities, costing the CoE €6 million a year. Yet even that sum is less than just the tax revenue from salaries and pension contributions for staff at its EU counterpart that fulfils the same job. So the wider question is why €89 million should be spent on maintaining a Committee of the Regions for the EU as well, which is *itself* duplicating the work done by MEPs. This is not the only down side. To quote one recent rapporteur, "reinventing existing norms and setting up parallel [EU] structures creates double standards and opportunities for "forum shopping", which leads to new dividing lines in Europe."[2]

A Bigger, Truer Europe

"Europe" does not end on the EU's borders. There is no "Swiss Sea" in the middle of the continent. The Urals have not been excised from de Gaulle's famous dictum at the other extreme from the Atlantic. Nor for that matter do we now bin the continent's spiritual and physical offshoots in the New World and Southern oceans, whose young men travelled to their forefathers' homes to support the democracies in their times of trouble.

"Europe" is bigger than the EU – geographically, spiritually, economically, psychologically. The truth is easy to forget, but only half of the Council's members are EU countries. Only roughly half again of those have merged their currencies. The Euro, and economic assimilation, is a minority activity.

Over the coming years, many EU opinion leaders will be put on the spot as the prospect of treaty changes loom through the fog. The "EU within the EU", the Eurozone, will cause many to reflect on what it means to be part of the political experiment of federal integration. The United Kingdom's activities merely place it at the vanguard of these debates, having identified the problems and issues first.

We simply recommend to those undertaking such critically important studies to look at the history of the project to date and reflect whether the direction is truly the one they want to travel in, or whether an intergovernmental approach is better. They should consider that that the alternative to being part of a federal Europe is not to be alone. It is to have a different and equally valid working relationship with our broader European family.

Brian Binley, MP
Davit Harutyunyan, MP
David TC Davies, MP

[2] *European Union and Council of Europe human rights agendas: synergies not duplication!* Michael McNamara, October 2013 (doc 13321).

BIS

Balance of Competences between the UK and the EU

Call for evidence: Single Market: Free Movement of Services review

Contribution submitted by the British Association of Snowsport Instructors (BASI)

Call for Evidence Questions from Page 18 of document issued in October 2013.

1. What do you see as the advantages and disadvantages of the EU action on the free movement of services? How might the national interest be served by action taken at a different level (for example, at the World trade Organisation level, or at the national level), either in addition to or as an alternative to EU action?

In answer to the first question within this,

The advantages are

A) UK citizens gain ability to follow the snowsport tuition market in the EU.
B) There has been a harmonising and setting of minimum standards.
C) This in turn protects the safety interests of the public.

The disadvantages are

A) the bureaucratic institutions in many nations appear to create difficulties to what should be a simple process for accepting an EU citizens application for Freedom of services and Right of Establishment and appear to hide behind smaller regional offices.
B) Derogations accorded to certain countries appear to be mechanisms for protectionist agendas for the snowsport professions.
C) Standard creep of qualifications and products can vary up or down because of possible protectionism or conversely, over extensive freedoms, which in turn affect their appropriateness (too hard/too easy) and affect the market.

National interest would be best served by action taken by "competent authorities" designated by UK government to the respective industry "watch-dog" such as Adventure Activity Industry Advisory Committee (AAIAC) for outdoor education providers to the general public, especially for non-regulated professions and training to safeguard against these variations.

2. To what extent do you think EU action on the free movement of services helps or hinders UK businesses?

The EU action helps UK businesses by expanding opportunities for broad approaches to general practices in respect of and integration of the different cultures nationally and regionally.

3. To what extent has the EU action on the free movement of services brought additional costs and/or benefits when trading with countries inside and outside the EU? To what extent has the EU action on the free movement of services brought additional costs and /or benefits as a consumer of services?

A World “association” in one instance has felt threatened by EU action and in dealing with both parts’ (EU and World) extra activities, this has caused extra costs.

As a consumer, in the beginning there were extensive costs to address the difference in interpretation of the free movement of services concept. More recently, there has been much more involvement by the EU internal market office staff that has greatly alleviated these costs and aided in more appropriately timed resolution to misunderstandings.

4. How well, or otherwise, have the EU’s mechanisms for delivering the free movement of services worked?

   This was initially fraught with focus on detail 15 to 20 years ago, and was interpreted as a “blocking” tool, as opposed to more recently the EU office of Jurgen Tiedje and Jens Gaster now encouraging mutual respectful growth and benefit.

5. In your experience do Member States take a consistent approach to implementing and enforcing EU rules, or not?

   In many Member States, there appears to be a protectionist agenda, which is applied with varying degrees depending on the extent of threat perceived by the host nation or value made on perceived influence of individuals’ involved.

6. Do you think the UK’s ability to effectively regulate cross-border provision of services would be better, worse, or broadly the same, as a result of more or less EU action?

   Cross-border regulation in snowsports for those coming to the UK would broadly remain the same unless this profession were to become fully regulated, in which case this could cause complications without EU involvement to oversee reciprocity.

7. What future challenges/opportunities might we face in the free movement of services and what impact might these have on the national interests? What impact would any future enlargement if the EU have on the free movement of services?

   The future challenges/opportunities could affect the UK public’s needs/preferences in sport, which in turn could impact on the national interest in maintaining standards for sport achievement and its future improvement, with general public health being affected also.

   The bigger the EU becomes the more difficult Quality Assurance measures are to implement consistently. Thus, EU rules and procedures would need to become more robust to maintain standards. This in turn could adversely become even more bureaucratically cumbersome.

8. Is there a case for more EU action to ensure that assessments for proportionality and necessity are more consistently interpreted? {see paragraphs 22 and 27 for more detail}. Or should the competence to assess these remain with the Member States, as is the case now?

   From our experience of negotiations with one particular Member State, it would appear that there is a requirement for more EU action to ensure that industry experts from all nations are called upon to rationalise the assessments.

9. Should decisions affecting the integrity of the Single Market be taken by all Member States and apply equally to all, or do you believe it is possible to take further liberalising action either unilaterally or with a selection of other Member States, whilst maintaining the integrity of the Single Market?

   This is dependent on the industry requirements. For snowsport, due to the nature of the impact the geography has on the industry, a liberalising action would probably be more appropriate to answer to these geographical impact variations.

10. What do you see as the advantages and disadvantages of the EU action on the **Mutual Recognition of Qualifications (MRPQ)**? To what extent do you believe that the cost of existing or future European rules in this area is proportionate to the benefits?

    The advantages of the MRPQ are the benefits for the public with the establishment of minimum standards, which in turn benefits the public safety. This in turn also benefits and up-holds career options in the industry.
    The current rules appear not to include “remunerated supervised work experience” opportunities for those training to attain the MRPQ standards.

11. What do you see as the advantages and disadvantages of EU action on **company law**? To what extent do you believe that the cost of existing or future European rules in this area is proportionate to the benefits?

12. What do you see as the advantages and disadvantages of EU action on **public procurement**? To what extent do you believe that the cost of European rules in this area is proportionate to the benefits? What is your view of the effect on the defence sector?

13. Are there any general points you wish to make which are not capture above?

    Dominant countries have a seemingly disproportionate political impact, which is not always pursuing the best interest for all EU nations and the original concepts created from the Treaty of Rome 1953.

Review of the Balance of Competences between the UK and the EU: free movement of services

British Chambers of Commerce response

Introduction

The British Chambers of Commerce (BCC) is an influential network of 53 Accredited Chambers across the UK, representing tens of thousands of businesses with millions of employees nationwide.

No other business organisation has the geographic spread or multi-size, multi-sector membership that characterises the Chamber Network. Every Chamber sits at the heart of its local business community, providing representation, services, information and guidance to member businesses and the wider local business community.

The safeguarding of the interests of UK businesses is critical to the debate on the future of Britain's relationship with the EU. The BCC continues to lead the EU debate within the business community through our quarterly EU Business Barometer and as the organisation that delivers both extensive trade support to British firms as well as representing the interests of British business.

Free movement of services in the EU

The BCC welcomes the chance to submit evidence to the Balance of Competences review on the free movement of services. The free movement of services is a critical aspect of EU membership as it provides our members with access to a market of 500 million people. The UK is the second-largest exporter of services in the world and services also account for over three-quarters of UK economic output[1]. The reality for businesses is that, compared to trade in goods, the Internal Market for services has barely got off the ground, much to the UK's economic disadvantage.

Even though all sectors in the economy may use services, at a European level services markets are not performing as well as the goods markets. In fact, since 2010, we have seen a steady increase of the performance gap between these two groups. Currently market services represent approximately 24 per cent of EU trade. Every year the UK exports services worth billions of pounds to EU countries - growing steadily at an average rate of 4.5% over the last decade. Completing the Single Market for services and eliminating all remaining barriers to trade inside the EU could sustainably generate national income gains, which would not materialize completely in an otherwise fragmented market.

The European Commission study on the economic impact of the Services Directive, carried out after the Directive was implemented, estimates that the economic impact will result in a 0.8% increase in GDP at EU level, with the impact varying between Member States from below 0.4% to about 1% in the UK[2]. However, the Commission acknowledged that if Member States were to increase implementation of the Directive, the economic impact could reach a 2.7% increase in UK GDP, a threefold increase on current estimates.

[1] UK National Accounts Q3 2013, Office for National Statistics.

[2] Commission Communication and study on the economic impact of the Services Directive

EU action on the free movement of services

As things stand, the EU has competency in the free movement of services, but the Services Directive allows Member States to maintain certain types of non-discriminatory restriction on the freedom to provide services temporarily if these can be objectively justified on the grounds of necessity and proportionality. Our members believe that the balance of competences between the EU and members states in this area is not appropriate and Member States should not be able to maintain certain types of restrictions on the free movement of services. More must be done to ensure that Member States take a consistent approach to implementing and enforcing EU rules.

Many of the rules governing the Internal Market for Services are also overly complex and expensive to comply with. The draft EU Data Protection Directive continues in this vein, with Chamber member feedback highlighting the overly strict and unworkable nature of it - where the burden would be greater on the average SME than those truly taking advantage of personal data. One business member, who is a sole trader offering a business telephone canvassing service, has fed back that the costs associated with implementing the proposed Directive may mean that her business is unable to survive. Another business member, a market research company based in Cambridge, has said that the draft rules would reduce employment and job opportunities in their firm as well as taking away the ability to practice responsible direct marketing which is a vital tool for companies to be able to generate the business they need to grow or just to continue trading. Our members are also discouraged from selling services across borders because they do not know their rights and the remedies available if they get into difficulty.

Our members tell us that they encounter considerable difficulties in obtaining information on national rules, competent authorities and procedures applied in other Member States. The associated costs with complex legal assistance, translation, license, authorisation and application of standards can be a prohibitive barrier for SMEs, which comprise the vast majority of the service provider market, to enter the cross-border market for services. As a ripple effect, SMEs may not be able to afford additional investments for innovation or differentiation of services, which in the long term could affect the performance of the entire economy. As a consequence, a high level of fragmentation between member states could have a significant negative effect on trade inside and outside the EU.

As a next step, the Commission should redefine and prioritise services markets, particularly those, which are not performing well. Member States need to assess thoroughly, at a national level, what is the actual economic impact of EU action in the area of free movement of services, as very often transposing EU legislation into national law involves high administrative costs.

The vetting of new technical legislation ahead of adoption by national governments in an attempt to prevent discrimination against operators from other Member States should be tightened up. Currently, the Commission is only authorised to give an opinion on protectionist national plans, not ban them outright before adoption. Consequently, the Commission's only weapon if a government ignores its opinion is to apply the infringement procedure, which can take several years to complete.

Chamber members would benefit from a targeted information campaign explaining the opportunities of trading in a fully functioning Internal Market for Services. The Department for Business Innovation & Skills also needs to do more to promote the recently launched UK Single Market Centre as a single portal for the various Single-Market-related services for business, under one virtual roof.

The EU should consider more effective enforcement of customs union legislation, including providing SOLVIT (the on-line problem solving network for EU Member States) with more resources to deal with customs infringements.

EU action on the free movement of services when trading with countries inside and outside of the EU

As the largest economy in the world, the EU has the necessary leverage to secure levels of access for our members, as evidenced through multilateral agreements - such as GATT and the proposed Transatlantic Trade and Investment Partnership (TTIP) with the US - which it would be unrealistic for the UK to achieve alone.

However, the Internal Market is only working in certain sectors and the Internal Market for Services remains fragmented. Furthermore, the benefits from trading globally via the EU have eroded over time as trade has become more globalised. The EU has a history of prioritising in trade agreements those economic functions which are most harmonised in its home market – e.g. goods regulations and standards.

The lack of a true Single Market for services means that for Chamber members, the one-size-fits all approach on trade agreements remains a concern as EU special interests are prioritised over UK interests. For the UK, services are of key importance but for other EU states the protection of goods by geographical name is more important. The UK is likely to continue to develop its services exports more than other members and if the EU does not prioritise these issues, UK services exporters could suffer. It is therefore imperative that the TTIP negotiations with the US reach a broad-based agreement for the unimpeded trade of services as well as goods.

Member States approach to implementing and enforcing EU rules

Although the Commission has been told by all Member States that the Services Directive has been transposed into national law, some Member States have incorrectly applied prohibited provisions of the Services Directive. Our members tell us that some EU Member States are still applying ownership requirements or fixed tariffs for professional services, legal form and shareholding requirements; or worse, discriminating against service providers on the basis of nationality. This clearly contravenes the terms of the Services Directive. The uneven implementation of Single Market rules for services across Member States undermines business confidence in the Single Market and creates problems for companies wishing to work or do business across borders.

Proper functioning of the internal market rules on services heavily depends on the full transposition of EU rules at a national level creating a level playing field for businesses across Europe. Therefore it is crucial that the Commission continues to support Member States in the renewal of their collective commitment and simultaneously put pressure on the ones that are lagging behind.

In addition, the Commission should also ensure that the smart and better regulation process is thoroughly implemented from beginning to end and not simply seen as an end in itself. It is also important that impact assessments themselves take into account whether the text of the legislation

is not overly complicated for Member States to effectively implement at national level and for EU businesses to apply. The Commission should also ensure that they take into account Member States' recommendations and ideas for the simplification of the existing EU rules. The Commission must significantly improve its post-implementation audits on how legislation is working and at coordinating the transposition of legislation to make sure it is done in a more consistent and efficient way. It is also necessary to have a comprehensive scoreboard to track progress at the EU and national levels, including any quantification of costs and benefits of all initiatives.

A level playing field does not exist with EU Member States having varying approaches when transferring EU State aid policy into their national systems. The experience of British businesses trading in other EU markets is that their local conventions are routinely assisted, in contravention of EU state aid rules. In contrast, the UK rigorously enforces EU state aid rules, often to the detriment to our own companies.

Allowing Member States to maintain certain types of non-discriminatory restriction on freedom to provide services has been a key factor behind inconsistent implementation of EU legislation by certain Member States. It has led to instances under the current Services Directive in which Member States can create an uneven playing field by exceeding a minimum standard set by EU rules by exploiting differences in languages and legal systems, with a disproportionate impact on smaller businesses.

EU action on public procurement

EU procurement rules have in theory allowed businesses to compete for public-sector contracts across the Internal Market on the basis of value for money rather than on nationality. Public procurement in services is of critical importance to British firms: the UK is among the biggest exporters of government services. UK exports of government services accounted for almost 5% of total world trade in government services in 2012, the second highest share of any EU member state[3].

However, public procurement market for services across the EU remains fragmented which adversely impacts the efficiency and costs of the procurement procedures in the Member States. In some instances national public tenders are not advertised on the European tendering system as they should be. Chamber members tell us of the onerous Pre Qualification Questionnaire (PQQs) requirements for public-sector contracts that are above the 'OJEU threshold' – the values above which contract notices must be published in the Official Journal of the European Union under EU law. Feedback from businesses also suggests that formal requirements from some Member States, such as local supply content and wage levels, are impeding fair competition and market access, which appear at odds with EU rules. The Classic and Utilities Public Procurement Directives will give even greater flexibility to contracting bodies to make strategic choices when procuring works, goods or services to achieve 'societal goals'.

Future challenges/opportunities in the free movement of services

The creation of a digital Single Market is a significant opportunity for the Internal Market for services. Failure to establish it could act as a drag on UK growth, particularly given its reliance on the

[3] Germany held the number one spot in 2012 according to UNCTADstat.

services sector to support economic growth. Though the rapid growth in e-commerce is opening important new opportunities, Chamber members continue to encounter significant difficulties making cross-border transactions in the EU.

The EU needs to look at ways to encourage the use both of technology and cross-border procurement. For instance, the Commission could assess the viability of making e-invoicing mandatory. EU data protection rules must also be technology-neutral and limited to fundamental principles and member states must take action to exceed EU targets for broadband reach and speed wherever possible.

The BCC remain keen to engage further as this review progresses. The BCC will continue to poll our members on issues relevant to this review and we will communicate our findings as soon as they are available.

BFI Response to Review of UK and EU balance of competences: call for evidence on the single market – free movement of services

January 2014

Executive summary

1. The BFI welcomes the opportunity to make a short response to this Balance of Competences Review relating to the Services Directive.
2. A range of public interventions at member state and at European level – funding, regulation and competition policy – will remain critical in ensuring that a diversity of films and moving images are available to audiences via a variety of services in a digital age.
3. We are aware that audiovisual services are excluded from the Services Directive. We believe that this should remain the case because the Audiovisual Media Services Directive is fit for purpose and there would be no benefits from brining audiovisual services within scope of the Services Directive.
4. In addition, copyright issues relating to Audiovisual are covered by the Information Society Directive and the Cinema Communication covers State Aid. Bringing audiovisual within scope of the Services Directive would introduce unnecessary complexity.

About the BFI

1. The BFI is the lead organisation for film in the UK. Since 2011, it has combined a creative, cultural and industrial role as a Government arm's length body and distributor of National Lottery funds. Its key priorities are to support a vibrant UK film culture by investing in film education, audience access, filmmaking and film heritage
2. In October 2012, the BFI published *'Film Forever, Supporting UK Film 2012-2017'*, which set out its strategy for the next five years, following an extensive industry consultation. It described the activities underpinning the BFI's three strategic priorities:
   a. Expanding education and learning opportunities and boosting audience choice across the UK
   b. Supporting the future success of British film
   c. Unlocking film heritage for everyone in the UK to enjoy.
   d. To that end, the BFI helps ensure that public policy supports film, television and the moving image and, in particular, British Film.
3. Founded in 1933, the BFI is a registered charity governed by Royal Charter.

Response to questions

1. What do you see as the advantages and disadvantages of EU action on the free movement of services? How might the national interest be served by action being taken at a different level (for example, at the World Trade Organisation level, or at the national level), either in addition to or as an alternative to EU action?

   The BFI wants to see a flourishing European film sector in which the audience has access to the widest possible diversity of material including European film and the indigenous industry flourishes and increases its market share in all media, including online.

   While the BFI recognises the advantages of the free movement of services generally, we believe that some services – such as the provision of film and moving images – are culturally specific and that to maintain cultural diversity it is necessary to ensure that Member States have flexibility in determining how they are delivered rather than them being subject to a "one size fits all" European framework.

For example, Public policy should encourage the creators and distributors of content to maximise the availability of choice to the benefit of audiences, while also maximising the benefit to European rights holders. Achieving a balance between these objectives is the challenge.

At the present time a legislative solution which imposed multi-territory licensing would be counter-productive because it would cause major disruption to the marketplace. It would be better to allow the online market to mature further and then to determine what, if any, legislative interventions may be required.

2. To what extent do you think EU action on the free movement of services helps or hinders UK businesses?

   See answer to Q.1.

3. To what extent has EU action on the free movement of services brought additional costs and/or benefits when trading with countries inside and outside the EU? To what extent has EU action on the free movement of services brought additional costs and/or benefits as a consumer of services?

   The BFI does not have sufficient evidence to be able to offer a view on this question.

4. How well, or otherwise, have the EU's mechanisms for delivering the free movement of services worked?

   We believe that the Audiovisual Media Services Directive and the means by which the copyright regime is governed (through a Directive), for example, are broadly fit for purpose.

   A range of public interventions at member state and at European level – funding, regulation and competition policy – will remain critical in ensuring that a diversity of films and moving images are available to audiences in a digital age. This does not mean jettisoning existing frameworks of support and nor does it require a major extension to the Audiovisual Media Services Directive (AVMDS).

   We believe that the market failures which relate to linear services, and which the AVMSD is designed to help address, will persist in a digital age and that therefore the Directive continues to play a valuable role. However, we have not seen any compelling evidence from the Commission or others in favour of an extension of scope of the AVMSD.

5. In your experience do Member States take a consistent approach to implementing and enforcing EU rules, or not?

   The BFI does not have sufficient information to offer an opinion on this question.

6. Do you think the UK's ability to effectively regulate cross-border provision of services would be better, worse, or broadly the same, as the result of more or less EU action?

   See answer to Q.1.

7. What future challenges/opportunities might we face in the free movement of services and what impact might these have on the national interest? What impact would any future enlargement of the EU have on the free movement of services?

   Continuing technological change in the field of audiovisual services means it is necessary to maintain a watching brief on the need for any significant legislative changes but we see no case at the moment.

8. Is there a case for more EU action to ensure that assessments for proportionality and necessity are more consistently interpreted? [see paragraphs 22 and 27 for more detail]. Or should the competence to assess these remain with Member States, as is the case now?

   For the reasons set out in response to Q.1 the BFI would prefer to see Member States retain this competence as it enables them to respond to local cultural conditions.

9. What do you see as the advantages and disadvantages of EU action on the mutual recognition of professional qualifications (MRPQ)? To what extent do you believe that the cost of existing or future European rules in this area is proportionate to the benefits?

   The BFI does not have a view on this question.

10. What do you see as the advantages and disadvantages of EU action on company law? To what extent do you believe that the cost of existing or future European rules in this area is proportionate to the benefits?

    We do not have sufficient evidence to answer this question

11. What do you see as the advantages and disadvantages of EU action on public procurement? To what extent do you believe that the cost of European rules in this area is proportionate to the benefits? What is your view of the effect on the defence sector?

    The BFI does not have sufficient evidence to a view on this question.

12. Are there any general points you wish to make which are not captured above?

    The BFI looks forward to contributing to future Government discussions on convergence, growth, creation and values in an EU context. This is especially true given the increasing economic competition from the BRIC and MINT countries.

BMA response to the Department for Business Innovation and Skills Call for Evidence: Single Market

The British Medical Association (BMA) is an independent trade union and voluntary professional association which represents doctors and medical students from all branches of medicine all over the UK. With a membership of over 153,000 worldwide, we promote the medical and allied sciences, seek to maintain the honour and interests of the medical profession and promote the achievement of high quality healthcare.

The BMA welcomes the priority given to public health and patient safety at EU level and recognises that some issues are best addressed at the supranational level due to the free movement of patients, doctors and medical products across borders and the prevalence of public health threats across Europe. It is essential that EU legislation fully respects the principle of subsidiarity and the right, enshrined in the EU Treaties, of member states to organise and finance their healthcare systems according to national practices. This is particularly important given the nature of the UK's publicly funded NHS. The European internal market guarantees that professionals can move and work freely throughout the EU by virtue of having their professional qualifications recognised in other EU member states. The application of EU competition and procurement rules to the NHS could have significant implications for the stability of local health economies and the quality of patient care. This response will focus on these two key areas of interest to the BMA; the Mutual Recognition of Qualifications Directive and public procurement and competition law.

1 Mutual Recognition of Professional Qualifications

The European Union (EU) has an important role to play in social and employment law. Health professionals benefit from EU health and safety legislation which in turn benefits patients in the form of increased patient safety. The European internal market guarantees that professionals can move and work freely throughout the EU having their professional qualifications recognised in other EU member states. The aim of the Directive is to allow European professionals (in certain regulated categories) with recognised qualifications to practise their profession in any European country without unnecessary restrictions or difficulties.

The BMA supports, in principle, the free movement of doctors in the EU, so long as there are appropriate safeguards to ensure patient safety. The UK health system has benefitted from EEA and international doctors practising in the UK. Due to the changing nature of modern medicine, the BMA recognises that the Directive on the Recognition of Professional Qualifications (2005/36/EC) requires updating. It is essential that the system emphasises a healthcare professional's continuing fitness and suitability to practise in the host member state. EEA doctors who exercise their right to free movement must be able to demonstrate regularly to the host competent authority that they are fully qualified and fit to practise.

The BMA has contributed to the debate on the revision of Directive 2005/36 and continues to engage with this process as we enter the transposition stage. This response summarises our ongoing concerns and highlights the challenges faced by the UK training system as a result of free movement.

1.1 Language Competence

The BMA believes that all doctors, whether they are from European Economic Area (EEA) countries or elsewhere, must have a clinically appropriate command of English, both written

and verbal, to enable a high level of patient care, including communicating with colleagues, patients and relatives. Before granting access to the profession, a competent authority must be able to satisfy itself that an individual doctor has the necessary skills in order to practice medicine in that country.

Both regulators and employers must be able to verify the language skills of EEA doctors where legitimate doubt arises. The EU rules do not prohibit language testing per se, rather they state that testing should be proportionate and not form part of the first stage process (i.e. recognition of the professional qualification). The competent authorities for the health professions should be able to verify language skills of applicants to the register directly or indirectly by delegating this to another body. The strength of concern around language testing has been recognised at a European level through improvements to the provision for language testing in the revised Directive.

Facilitating the movement of professionals is an important principle. It must not restrict the actions of the General Medical Council (GMC) and employers in undertaking essential language checks. The EU should set the requirements that facilitate free movement whilst providing member states with the ability to implement additional controls where there is evidence that indicates a legitimate need.

1.2 Length of Basic Medical Training

Provisions that set the length of Basic Medical Training are essential and must recognise that longer training time does not necessarily equate to better trained doctors. The UK four year graduate entry programmes prove that shorter, more intense, well designed and delivered and educationally challenging courses can produce high calibre trainees and fully competent doctors. The BMA supported the move to clarify the current wording of the Directive from 6 years *or* 5500 hours to five years *and* 5500 hours. The move to 5 years *and* 5500 hours recognises that training practices are changing and that the length of training is far from the only factor that determines quality.

1.3 Oversubscription of the UK Foundation Programme

In 2012, for the third year running, the UK Foundation Programme was oversubscribed, with more applicants than posts in 2013. This situation is likely to be repeated in subsequent years with the problem of oversubscription becoming more acute. All medical students graduating from UK medical schools must obtain a place on the Foundation Programme. Without the opportunity to complete Foundation Year One (FY1) a doctor cannot secure registration with the GMC and cannot practise as a doctor in the UK or elsewhere. This would have a devastating effect on any affected graduates and would waste substantial financial investment in educating and training doctors. The causes of oversubscription are complex. One contributing factor is the unpredictable number of applications from eligible EEA graduates. The impact on the Foundation Programme, and on UK graduates, of new states joining the EU continues to be a real concern. Any move to change the point of registration, currently being considered as part of the Shape of Training Review, needs to consider the likely impact in relation to free movement and any subsequent increase in applications from the EEA that might result.

A further difficulty experienced by those at UK medical schools is the ability to have pre-registration experience in Europe recognised so that it leads to full registration in the UK. It is possible for EEA medical students who are at the pre-registration stage to apply to the UK Foundation Programme and progress to full registration. The facility for the movement of UK students to Europe to complete their training is not straightforward and comes with the associated risk that training will not be approved.

Language barriers continue to be a barrier to completion of training in Europe. It is often the case that the level of English attained by our European colleagues is higher than the language

competence obtained from the UK education system making it harder for UK citizens to maximise their rights of free movement.

1.4 European Professional Card

The BMA has concerns about the European Professional Card (EPC) element of the updated Directive and its potential impact upon patient safety. The EPC is intended to simplify the recognition of professional qualifications and increase the efficiency of the procedure for professionals who intend to take up a regulated profession in other member states where the profession in question is regulated. It is intended to enhance synergies and trust among competent authorities, while at the same time eliminating duplication of administrative work and recognition procedures for the competent authorities (CA), and creating more transparency and certainty for professionals.

1.4.1 *Summary of the EPC*

- It is expected to take the form of an e-certificate, printable from data stored on the EU's Internal Market Information (IMI) system.
- Member States shall designate CAs e.g the GMC - for dealing with IMI files and issuing EPCs
- Introduction of the EPC should take into account the views of the profession concerned and should be preceded by an assessment of its suitability and its impact on Member States
- When an EPC has been introduced for a profession it will be issuable to professionals upon request, and after submission of necessary documents and completion of related verification procedures by the CAs
- The EPC shall be valid in the entire territory of all the host Member States for as long as its holder maintains the right to practice
- An EPC will contain all the necessary information to ascertain the holders right to practice
- Access to the information in the IMI file shall be limited to the CAs of the home and the host Member States
- In relation to doctors seeking to practice in the UK, their CA of origin will be responsible for completing all preparatory steps for the issuing of the EPC, including ascertaining whether all the necessary documents are valid and authentic
- In the event of duly justified doubts as to their authenticity or veracity, the CAs of both the home and host Member States may request certified copies of documents from the applicant
- Issuance of an EPC shall not provide an automatic right to practise
- Fees incurred by the applicant shall be reasonable and not act as a disincentive to applications for an EPC
- Employers, customers, patients, public authorities and other interested parties may verify the authenticity and validity of any EPC presented to them.

1.4.2 Issues with the EPC

The anticipated increased involvement of the home member states' competent authorities in this process is of particular concern. The intention is that the home CA will need to check the validity and authenticity of a professional's documents, create an electronic file on IMI and send this to the GMC. This differs substantially from the current process where the GMC, as the host CA, is responsible for carrying out all the registration checks. This shift in responsibility could make the UK's registration processes vulnerable to fraudulent applications, as the controls in other member states may not be as thorough as in the UK. A significant proportion[1] (6% in 2012) of doctors practising in the UK received their medical qualification from another

[1] BMA 2012 UK Medical Workforce Briefing

European Economic Area (EEA) state. It is imperative that the host member state is able to take the necessary steps to manage this process and to ensure that such an inflow does not impact adversely upon patient safety. At present the GMC is responsible for carrying out all registration checks in the UK. The proposed shift away from this process could weaken the UK's ability to prevent fraudulent applications. The competent authorities in other member states may not be as well resourced or experienced in detecting such issues as the GMC. Both the home and the host CAs will only be able to request certified/original copies from the applicant in cases of "duly justified doubts". Such a provision may threaten the GMC's identity checking system which was introduced as a direct response to a number of cases of fraud and identify theft.

The potentially devastating consequences for patient safety and the NHS of any failure to detect fraudulent applications to the medical profession are self evident and do not require further clarification. A European Commission (EC) call for expressions of interest from the regulated professions in adopting the EPC, stated that "Doctors… have already expressed their interest in working with the Commission on the introduction of the EPC for their profession."
The BMA is a member of the Standing Committee of European Doctors (CPME), European Union of General Practitioners (UEMO) and European Union of Medical Specialities (UEMS) which were subsequently cited by the EC as having provided the evidence to justify this claim. We wrote to the EC to advise as to our aforementioned concerns and queried its summary with regard to the introduction of the card to the medical profession. The CPME had written to the Commission but as a means to indicate that they would be interested in discussing the potential introduction of the card further with the Commission, rather than expressing an interest.

The introduction of the card is subject to several strict conditions including the provisions cited in Article 4a(7)): (b) that state there needs to be sufficient interest expressed by the relevant stakeholders for implementation to go ahead. The BMA has reiterated to the Commission that its introduction, or otherwise, should be dependent upon their being genuine consensus within the medical profession. We also advised as to our interest in working with the EC and other stakeholders to discuss the potential benefits of the EPC to the medical profession. Should such discussions result in the European medical profession reaching a genuine consensual position, then we advised that the BMA would wish to be part of the process by which the functionality of the EPC is developed. The CPME and UEMO also wrote to the EC to advise that their expressions of interest in discussing the potential introduction EPC should not be used as a means to justify meeting the criteria laid out in Article 4a(7)): (b).

The EC's analysis of the results of the call recognised that a more thorough assessment has to take place in relation to the medical profession. It also concluded that a more in-depth analysis of the introductory criteria is required and that the EPC will only be proposed if the medical profession fully meets the selection criteria. Further comments on the matter have been requested by the EC and the BMA will respond by the 10 January 2014 deadline to reiterate our concerns and overall position. Any decision relating to the introduction, or otherwise, of the EPC to the medical profession must be based on discussions between stakeholders, including the BMA, and the EC. The medical profession's view must be given primacy with the majority opinion respected and acted upon. Should this process result in the EPC being introduced to the medical profession, the BMA wishes to be involved in the development of its functionality and implementation to ensure that increased professional mobility does not compromise patient safety.

1.5 Delegated Acts and Specialty Training Curriculum

The BMA has particular concerns around the use of delegated acts which would give the European Commission the power to supplement certain 'non-essential' elements of EU law. Delegated acts have supremacy over national laws and are approved through expert committees which are led by the Commission. These delegated acts add an additional layer of complexity to the EU legislative landscape enabling the Council and Parliament to partially

regulate a particular field and to delegate power to the Commission to supplement the regulations. The BMA is particularly concerned about the potential use of delegated acts to regulate the minimum periods of specialist training and the inclusion of new medical specialties in the Directive's annexes. In any circumstance where delegated acts are used the BMA would expect the European Commission to carry out appropriate and transparent consultations with experts from competent authorities and professional associations when preparing such acts.

There have been some discussions at a European level regarding the harmonisation of specialty training curricula. Any setting of European wide curricula must be approached with care, especially if any legal basis were to be formed through delegated acts. The BMA supports the creation of high standards across Europe. There is a danger that UK standards, or the standards of those admitted to the medical register from Europe, reduce in line with an EU minimum. The current UK specialty curricula have complex oversight systems but remain flexible to changes. This flexibility could be lost if it became EU-led. The BMA believes that the efforts required to reach a harmonised standard for specialist training would neither be worthwhile nor produce meaningful or safe standards, and would ultimately add unnecessary complexity to the UK's system by replicating the work of the medical Royal Colleges and the GMC.

1.6 Recognition of General Practitioners

The Directive is designed to facilitate the free movement of doctors within the EU and lists those medical specialties that are recognised within EU member states. In recent years, an increasing number of EU countries have introduced a specialty in family medicine as well as or instead of the traditional title of general practitioner. The current situation in which two tiers of general practitioner, operating under different provisions of the Directive, exist across the EU is hampering the ability of doctors to move freely across the EU contrary to a right that is enshrined in the EU's founding treaties. Doctors from those countries where general practice is not recognised as a specialty (as in the UK) are not able to join the specialist GP register in countries where general practice is considered to be a specialty (such as Germany). This creates a two-tier system of GPs and prevents UK doctors from practicing medicine under the same terms and conditions as their German counterparts. This has resulted in the creation of a barrier to genuine free movement of doctors across the EU. There is a lack of political will to address this situation.

1.7 Workforce planning

The BMA has not seen any clear information that indicates the proportion of the medical workforce that is working under the rights of free movement. The only data we have is on the origin of basic medical qualification but this does not show whether someone from outside the EEA gets recognition in another EU country and subsequently moves to the UK when they acquire rights of free movement. This increases the uncertainly within medical workforce planning and competition at the different grades from the Foundation Programme through to consultant level. This lack of information makes it very difficult to make any judgement on the impact of free movement on the medical profession.

Without clear data it is difficult to determine what the scale of the UK workforce movement currently is to and from Europe. Without such data we cannot determine challenges or opportunities to the UK and the impact of future enlargement of the EU on the medical workforce. A requirement to collect data, beyond that on primary medical qualification would help in making a full assessment of the impact and assist with workforce planning.

The BMA will be watching any developments that seek to use the mutual recognition of qualifications directive as a basis for future recognition of qualifications from outside of the EU. This is of particular interest as the EU and USA are currently negotiating a proposed Transatlantic Trade and Investment Partnership (TTIP). EU market access negotiators may aim to ensure that European professional qualifications can be recognised across the USA, and vice

versa. Data on the current impact (both positive and negative) of the mutual recognition of qualifications on the UK is essential before any further extension of these rules.

The BMA supports freedom of movement for doctors who wish to pursue their careers in other countries but patient safety is paramount and must not be compromised. All doctors, whether from the European Economic Area countries or elsewhere, must have a clinically appropriate command of English and the requisite clinical skills if they wish to practise in the UK. The UK must continue to protect the quality of its training. EU legislation must fully respect the principle of subsidiarity and the right, enshrined in the EU Treaties, of member states to organise and finance their healthcare systems according to national practices. This is particularly important given the nature of the UK's publicly funded NHS.

2. Public procurement and competition law

The Health and Social Care Act (2012) has radically reformed the NHS commissioning system. Both EU and UK Government legislation encourage commissioners to use procurement as a means to ensure competitiveness and plurality. Successive UK governments and the European Union (EU) have developed policy governing public sector procurement with the intention of ensuring cost-effective commissioning and increasing competition within public services. Procurement is governed by domestic and EU procurement and competition law, which outlines when procurement is appropriate and the process and timetables to be followed. Subject to these regulations, commissioners of NHS services may choose when to use procurement processes (they are not obliged to put every contract out to tender) but must be able to justify the decision taken. EU legislation distinguishes 'Part A' and 'Part B' services. Health and social care services are classified as Part B and subject to more flexible procurement rules and processes than Part A services. Non-clinical services, such as waste disposal, may be classified as Part A services and subject to more rigorous rules. EU procurement rules pertain to public service contracts worth over £173,934[2]. Department of Health procurement guidance stipulates that, in addition, all contracts worth over £100,000 (over the lifetime of the contract) must also be advertised and tendered.[3]

The BMA is concerned that the changes to the NHS in England may result in EU competition and procurement rules being applied to the publicly funded NHS. This could mean that bidders from across the EU would be given the same rights as local providers and that competition rules could apply to commissioning activities undertaken by clinically led commissioning boards. The application of these rules could have significant implications for the stability of local health economies and the quality of patient care.

Value for money in public procurement is not achieved by giving preference to the most advantageous bid for a tender not least as it may undervalue quality of outcomes. Broader social, ethical and environment benefits should be considered in public procurement decisions. The provision of healthcare goods and services is big business; the NHS alone spends £30 billion on procurement every year. The market for such commodities is global, and increasingly is being outsourced to minimize costs. There is evidence that such outsourcing is harming basic labour rights, and also the health of populations elsewhere. This is not just an issue in the UK and the BMA believes that more should be done to change procurement practices. This should be supported at a European level to encourage those organisations that are already changing their practices and to recognise this. Effective ethical procurement is not easy and needs commitment from many levels; a commitment from Europe would be a positive driver for change. The International Market and Consumer Protection Committee is currently proposing amendments to the Public Procurement Directive, which will be voted on in the European Parliament on 14

[2] This is the EC Procurement threshold for Public Contract Regulation as from 1 January 2012; however the threshold is subject to change and should be checked at appropriate intervals.
[3] Procurement Guide for Commissioners of NHS-funded Services (Department of Health, 2010)

January 2014. The BMA is heartened to see that support is growing for an amendment to the Directive that would see procurement contracts going to the most 'advantageous' bidder, assessed on environmental or social criteria, not just the lowest bidder.

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Department for Business, Innovation and Skills
1 Victoria Street
London SW1H 0ET
Sent to balanceofcompetences@bis.gsi.gov.uk

13th January 2014

Dear Sir/Madam,

Government's review of the balance of competences between the United Kingdom and the European Union, Call for Evidence: single market: free movement of services review

BSI (British Standards Institution) has read with interest the call for evidence on the balance of competences in the area of the free movement of services. This letter contains BSI's views on the balance of competences as they relate to the encouragement and initiation of standardization work. These views are of a general and overarching nature and relate to parts of questions 1-4 in the call for evidence.

Standards, for voluntary use and developed by independent standardization bodies on the basis of consensus of all interested parties, can be used by Government as an alternative to regulation. They can in particular support the completion of the European internal market for services and enable free movement of services across Member State borders.

For standardization to be successful in supporting the European internal market for services common expectations are needed across EU Member States. Where a true internal market for services does not exist in Europe, it may not be appropriate to seek the development of European standards as a first step. The European Commission should therefore consider evaluating the potential impact of standardisation before activity is undertaken.

An example of such an activity is the mandate (request) from the European Commission, M/517, which will look for standards priorities to support services within Member States and across their borders.

The development of national standards can be useful as a precursor to European or international work. Standardization may be an effective tool in supporting not only the free movement of services but also assurance at a local level by increasing confidence amongst buyers of services whether business or consumer.

Background on BSI

BSI is the UK's National Standards Body, incorporated by Royal Charter and responsible independently for preparing British Standards and related publications and for coordinating the input of UK experts to European and international standards committees. BSI has 113 years of experience in serving the interest of a wide range of stakeholders including government, business and society.

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BSI also presents the UK view on standards in Europe (via the European Standards Organizations CEN and CENELEC) and internationally (via ISO and IEC). BSI has a globally recognized reputation for independence, integrity and innovation ensuring standards are useful, relevant and authoritative.

BSI, as the UK's NSB, is responsible for maintaining the integrity of the national standards-making system not only for the benefit of UK industry and society but also to ensure that standards developed by UK experts meet international expectations of open consultation, stakeholder involvement and market relevance.

A BSI (as well as CEN/CENELEC, ISO/IEC) standard is a document defining best practice, established by consensus. Each standard is kept current through a process of maintenance and review whereby it is updated, revised or withdrawn as necessary.

Standards are designed to set out clear and unambiguous provisions and objectives. Although standards are voluntary and separate from legal and regulatory systems, they can be used to support or complement legislation.

Standards are developed when there is a defined market need through consultation with stakeholders and a rigorous development process. National committee members represent their communities in order to develop standards and related documents. They include representatives from a range of bodies, including government, business, consumers, academic institutions, social interests, regulators and trade unions.

BSI would very much welcome the opportunity to meet Northern Ireland Executive officials to discuss how standards could play a role to deliver the innovation strategy for Northern Ireland. We would also be happy to deliver information on the role of standards in supporting innovation through workshops with key stakeholders including Northern Ireland Executive officials.

I would be pleased to discuss this or other issues at your convenience.

Yours faithfully,

Richard Collin
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HMG Review of the Balance of Competences - Services

BT is committed to a European Single Market based on principles of openness, fair competition, a level playing-field, and encouragement of innovation. The UK has been a leading force in shaping the EU on these policy lines and should continue to engage fully in their support.

We do not take a formal position on the optimal Institutional arrangements, and are opposed to a number of EU legislative proposals such as on pensions solvency II. We believe however that the current '*acquis*', and the role played by the Commission in its enforcement, are vitally important for UK (as well as other EU) companies, and for the ICT sector. We would be concerned if the benefits - particularly in terms of market access and competitiveness - were to jeopardised by a re-negotiation of competences were this to risk unravelling the existing balance.

Policy Areas

- Internal Market policy must clearly remain an EU-level competence if it is to have any meaning. Effective extension in some areas e.g. energy markets, pay-tv and content, and in broader public procurement would be very welcome. Fair competition and access to markets clearly depends on a consistent approach to market liberalisation, but the missing ingredient is usually better enforcement rather than additional legislation. Where new legislation is proposed, it should be subject to much more effective tests of 'European added value' – in other words there should be an agreed need that an issue needs tackling and can only be done so effectively at supra-national level. This could include a competitiveness test for the measure itself and for its cumulative interaction with other measures. We need a forensic approach to new legislation not the a *tsunami*. Similarly the current UK Government approach to implementation of EU measures seems appropriate to us: (a) there should be no 'gold-plating' of EU measures; and (b) no early implementation, unless there is demonstrable advantage to the UK.

- EU Electronic Communications legislation needs far more effective and consistent implementation of existing rules, applied to all converging sectors across the telecommunications, television, broadband and content industries, rather than new, additional legislation. Very different regulatory and appellate procedures and laws in some countries can act to delay and/or neuter the introduction of competition or investment. As a UK-based operator doing business across the EU (and globally) we are conscious that even under existing rules we are placed at a competitive disadvantage to other European (and indeed US) operators gaining fair access in the UK but where is no reciprocal access in their home markets e.g. Spain, Germany, USA. This impacts negatively on the UK and would be exacerbated by being treating as a purely national competence;

- The EC with UK support needs to reinforce the push for a more effective Telecoms Single Market. There should be a much greater focus on implementation and consistent application of rules rather than development of new ones, with new regulatory initiatives should reflect greater evidence of genuine market failure. Amendments to legislation by Council and European Parliament need to meet the same criteria for impact assessment.

- As telecoms and media markets converge, the existing EU framework needs to be adapted to ensure a common set of rules - based on the competition law principles already enshrined in the Telecoms framework - to guarantee more effective consumer choice and innovation.

- Better coordination/thinking: a review of the overlaps and interdependencies between EC directorates and between EU institutions may also help to drive efficiencies in policy making and to avoid '*a thousand flowers blooming'*. There are, for example, many complexities and possible inconsistencies in the development of EC policy on climate change and energy/environment etc. policies as they impact on the ICT and other sectors. Similarly, the many initiatives from various parts of the EC on sustainability, CSR and human rights and related mandatory reporting, accounting or voluntary codes. Other examples are the draft Data Protection Regulation and the draft Network & Information Security Directive which, whilst sensible in broad principle in relation to harmonisation and strategy, go into very substantial and prescriptive detail e.g. complexity on definitions, new rights and obligations, free DSARs, anti-trust level fines etc. This is done in a way currently which bears limited proportionate thinking against EU competitiveness versus Asia/US, such as in relation to the costs to EU businesses and the potential cooling impact on innovation.

There are number of areas of EU services policy-making that give serious cause for concern. We believe these are probably best tackled by more effective and consistent implementation and enforcement of existing rules (*notably the Services, Procurement and EU Telecom Package EU legislative measures*), and a more selective and evidence-based approach to any new legislation rather than a radical change to existing Institutional or Treaty relationships. The areas of pensions and some employment legislation may however be best dealt with as national competencies constitutionally.

BT
January 2014

BSA – The Business Services Association

Call for Evidence Response – Single Market and Free Movement of Services

January, 2014

The Business Services Association is a policy and research organisation. It brings together all those who are interested in delivering efficient, flexible and cost-effective service and infrastructure projects across the private and public sectors. We are the only UK trade body represented on the EU's Higher Level Group on Business Services.

Outsourced and business services contribute around £113 billion per year to the gross value added measure of UK output, support over 10 percent of all UK workforce jobs and pay just under £14 billion to the UK exchequer each year in the three main business taxes.[1]

The business and outsourced services sector is extremely varied. What do managing facilities for the UK's top companies, helping the private sector cut its energy consumption, building roads, schools and hospitals, repairing railway lines, running urban cycle hire schemes, governing prisons, helping people back into work have in common? The common thread is that they are provided to a client organisation which can be in the public or private sector, under contract, for a time-limited period. The sector works on the basis that competition increases efficiency and encourages innovation.

We welcome this opportunity to respond to the Foreign Office's call for evidence of the balance of competencies in relation to the 'Single Market and the Free Movement of Services.'

Our response focuses on the need to fully implement the Services Directive and suggests that the European Union is the best vehicle through which to achieve this. The Commission calculates that the Directive, as implemented, will boost EU GDP by 0.8percent. If Member States reduced barriers to free movement of services to the level of the five countries which have most fully implemented the Directive, that figure would double to 1.6percent.

We welcome the Government's stated commitment to full implementation of the Services Directive and urge them to continue to press for reform through membership of the European Union.

[1] Oxford Economics – UK outsourcing across the private and public sectors: An updated national, regional and constituency picture – November, 2012.

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Question 1: What do you see as the advantages and disadvantages of EU action on the free movement of services? How might the national interest be served by action being taken at a different level (for example World Trade Organisation level, or at the national level), either in addition or as an alternative to EU action?

The EU has a significant role to play in terms of ensuring the free movement of services. Action at EU level is important as it is a huge services market. Intra-EU trade in services amounted to close to 792 billion Euros in 2012.[2]

Liberalisation of markets for services at EU level particularly benefits the UK. Comparatively within the EU, the UK is a service orientated economy with a mature services sector which accounts for 79 percent of domestic economic activity. This is above the EU average of 70percent.[3] Consequently, the UK has consistently had a trade surplus with the EU in terms of services and has done so since 2005. In 2012 this trade surplus was 14.3 billion Euros.[4]

Question 2: To what extent do you think EU action on the free movement of services helps or hinders UK businesses?

See Question 1

Question 3: To what extent has EU action on the free movement of services brought additional costs and/or benefits when trading with countries inside and outside the EU? To what extent has EU action on the free movement of services brought additional costs and/or benefits as a consumer of services?

See Question 1

Question 4: How well, or otherwise, have the EU's mechanisms for delivering the free movement of services worked?

The UK has already benefited from the implementation of the Services Directive, which has provided a boost of around 1percent to domestic GDP.[5] However, whilst the Services Directive has seen some benefits to the UK services sector, these benefits have not been *fully* realised. Across the EU, a considerable 'home bias' remains for domestic service providers.

It should be a priority for the UK Government to promote full transposition of the Services Directive across the EU. Estimates suggest that if full implementation happened then the UK would be the third biggest beneficiary in terms of GDP growth across all 27 member states.[6]

In addition, while single market rules are (at least formally) adhered to at national levels, it is very often at regional and sub-regional level where they are not implemented. The UK has a strong track record of pushing implementation sub-nationally and we would encourage the Commission to take steps to replicate this approach.

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[2] BIS – Government's Review of the Balance of Competencies Between the United Kingdom and the European Union: Call for Evidence on the Single Market and Free Movement of Services – October, 2013.
[3] BIS – Government's Review of the Balance of Competencies Between the United Kingdom and the European Union: Call for Evidence on the Single Market and Free Movement of Services – October, 2013.
[4] BIS – Government's Review of the Balance of Competencies Between the United Kingdom and the European Union: Call for Evidence on the Single Market and Free Movement of Services – October, 2013.
[5] Open Europe – Kick-starting growth: How to reignite the EU's services sector – April, 2013.
[6] Open Europe – Kick-starting growth: How to reignite the EU's services sector – April, 2013.

Question 5: In your experience, do Member States take a consistent approach to implementing and enforcing EU rules, or not?

When it comes to implementing the Services Directive, considerable variation exists across EU member states. During 2010 and 2011, a mutual evaluation exercise conducted between member states showed that whilst some states such as Slovakia and Slovenia took considerable attempts to lower barriers to service provision across borders, others such as France, Austria and Italy retain highly protected services industries.[7]

Across the EU as a whole, the number of barriers to cross-border provision of services fell by one-third following the passing of the Services Directive. However, a number of barriers have remained because individual states labelled them 'proportionate' – which the Services Directive entitles them to do. Therefore, a much clearer definition of, and test for, proportionality needs to be sought.

Question 6: Do you think the UK's ability to effectively regulate cross-border provision of services would be better, worse, or broadly the same, as the result of more or less EU action?

The BSA believes that full implementation of the Services Directive would best be achieved through a more proactive EU. An immediate step that the Commission could take would be to repeat, regularly, the mutual evaluation exercise which was conducted previously.

As stated above, the recent mutual evaluation exercise has highlighted where in the EU the Services Directive has not been fully embraced. Given that there is no mechanism through which member states are required to provide information on implementation, without a repeat of the mutual evaluation process, the Commission would be required to sift through domestic legislation of each member state to test the extent to which the Directives have been implemented – something which it does not have the resources to do. Instead, the mutual evaluation exercise should be repeated on a rolling basis to highlight where barriers still exist, to enable the EU to take action where necessary.

Question 8: Is there a case for more EU action to ensure that assessments for proportionality and necessity are more consistently interpreted? Or should the competence to assess this remain with Member States as it does now?

See Question 6.

Question 9: Should decisions affecting the integrity of the Single Market be taken by all Member States and apply equally to all, or do you believe it is possible to take further liberalising action either unilaterally or with a selection of other Member States, whilst maintaining the integrity of the Single Market?

The ideal would be full implementation of the Services Directive across all EU Member States. However, if this is not feasible there would still be benefit to a smaller group of EU countries pressing ahead with reform under an 'enhanced cooperation' arrangement.

The basis of this could be the 12 signatories of a "pro-growth" letter to the European Commission in February 2012. This was signed by the UK, Netherlands, Italy, Estonia, Latvia, Finland, Ireland, Czech Republic, Slovakia, Spain, Sweden and Poland. It committed to "open up services markets" with "urgency, nationally and at European level, to remove the restrictions that hinder access and competition."[8]

[7] European Commission – Communication on the implementation of the Services Directive – June, 2012.
[8] Letter to President of Commission and Parliament from leaders of 12 EU Member States.

Estimates suggest that even if these 12 countries alone adopted an 'enhanced cooperation' approach, it would still produce a lasting boost to EU GDP of up to 1.17percent or 147.8 billion Euros.[9]

An enhanced cooperation approach has already been taken three times previously – regarding trans-EU divorce law, European patent law, and financial transaction tax.

Full implementation of the Services Directive between the pro-growth 12 would meet the test required of enhanced cooperation, such as reinforcing the integration process. However it should be noted that such an approach should only be a last resort. Attempts for full integration across all 27 Member States (as outlined in our response to Question 5) should be tried first.

Question 12: What do you see as the advantages and disadvantages of EU action on public procurement? To what extent do you believe that the cost of existing or future European rules in this area is proportionate to the benefits?

Clear procurement rules which span the EU are needed if a services market is to function well. The BSA welcomes the changes which are currently being made to the Procurement Directives in order to make procurement quicker and simpler – for example, greater use of self-certification by providers and increased flexibility on minimum response times to permit more rapid procurement of certain services, especially for more 'off the shelf' services. We are pleased that the Cabinet Office plans to transpose the revised Procurement Directives rapidly in order to ensure clarity in the market.

Some steps could be taken internally to ensure that the revised Directives are fully embraced as at times contracting authorities, by being risk averse, do not embrace them to their full potential.

[9] Open Europe – Kick-starting growth: How to reignite the EU's services sector – April, 2013.

Appendix A: List of BSA Membership

Full Members:

Amey
ARAMARK
Babcock Infrastructure Services
Balfour Beatty Workplace
Berendsen
Bouygues Energies and Services
BT
Capita
Carillion
ClearSprings
Compass Group
Costain
Dalkia plc
Elior UK
G4S
Interserve
ISS UK
John Laing
Kier Services Ltd
Laing O'Rourke
Maximus UK
MITIE Group
MYFM
OCS Group Ltd
Pinnacle PSG
Prospects Services Ltd
Serco
SGP Facilities Management
Skanska
Sodexo
TerraQuest
URS
Vinci Facilities
Williams Lea

Associate Members:

Barclays Corporate
Bevan Brittan
Berwin Leighton Paisner LLP
Control Risks
Deloitte
Drax Executive
ECI Partners
ERSA - Employment Related Services Association
Expert Patients Programme Community Interest Company
Grant Thornton
Harvey Nash
KPMG
Matrix Control Solutions Ltd
Metzger
Navigant Consulting
Nicholas Moore
PA Consulting
Pinsent Masons
PricewaterhouseCoopers UK
Reynolds Porter Chamberlain LLP
Royal Bank of Scotland
Sharpe Pritchard
Trowers & Hamlins
Warren Partners

BUSINESSEUROPE

POSITION PAPER

5 March 2013

KEY COMPONENTS FOR BUILDING A TRUE SINGLE MARKET FOR SERVICES

1. FACTS AND FIGURES[1]

- Services in Europe account for more than 65% of EU GDP and employment.
- From 1998 to 2008, Europe's services sector grew by an annual average of 2.8% while EU growth averaged 2.1%. In the same period employment in the sector grew by 2% a year, compared with 1% for the economy as a whole.
- Services also proved quite resilient during the economic crisis: services turnover fell by 8.5 % in the EU-27 in 2009 compared with the year before but rebounded in 2010 increasing by 5.0 %.
- Yet, only 20% of the services in the EU are provided across borders, accounting for just 5% of EU GDP compared with 17% for manufactured goods. Even taking into account that some services are in nature more local and less tradable than goods and the fact that establishment of businesses or subsidiaries abroad is not included in these calculations, these figures are relatively low.
- Services are an essential part of the EU industry, be it as inputs or as outputs. In fact, 75% of trade in services concerns the supply to other businesses (B2B), hence their importance for the overall competitiveness of the EU economy.
- Moreover, the biggest *client* of service companies are service companies, which reveals a genuine "*economy of services*". Generally, we also see that manufacturing companies are providing more and more additional services related to their product(s), a so-called process of "*servicification*".

2. THE SERVICES DIRECTIVE

Implementation

- More than three years after its transposition deadline, BUSINESSEUROPE regrets to observe that the 2006 Services Directive is still not fully implemented and correctly applied in all Member States.[2]
- This is unacceptable, especially as it has been calculated by the Commission that achieving high quality implementation and stronger enforcement of the Directive in

[1] Source: European Commission & EUROSTAT – June 2012 Services Package, Single Market Acts 1 & 2, January 2011 Services Communication and BUSINESSEUROPE.

[2] More information on business' views on the implementation of the Services Directive here: "BUSINESSEUROPE position paper – Building a genuine single market for services" of May 2012.

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all Member States alone can bring additional gains of about 1.8% of EU GDP (about €330 billion). We can simply not afford to miss this potential for growth.

- It has proven challenging to ensure that all national and sectoral rules applicable to service providers comply with the Services Directive and that its provisions are indeed well-applied and enforced on the ground.

- Another major challenge lies in the fact that the decision to abolish certain restrictions (Article 15 and 16), which may in some limited cases be justified under the Services Directive for an overriding reason of general interest, are left to Member States to make. Member States have a large area of discretion, a so-called "*grey zone*", where they solely decide on the basis of proportionality whether a certain national restriction is justified or not.

- In principle this is justified, however, BUSINESSEUROPE observes that in several cases, governments and responsible authorities did not conduct a proper proportionality analysis for national rules and authorisation schemes. As a result, overly burdensome and disproportionate rules often remain in place. Or worse, they are kept to protect local, regional or national interests going entirely against the European spirit of the Directive.

- To address this last challenge, the Commission calls on Member States to re-assess the economic benefits of eliminating such restrictions and take actions where necessary. Yet, BUSINESSEUROPE has serious doubts whether such a voluntary approach will be fruitful. It might be more helpful to further clarify the concepts of "*proportionality*" and what exactly constitutes an "*overriding reason of general interest*". In any case, we call for an open debate on the proportionality analyses that have been made and the degree to which Member States have used their room for manoeuvre and kept certain restrictions which are at the very least questionable.

- In the above context, we repeat that Member States must always respect the substance of a Directive or Regulation, avoid ambiguities and refrain from adding additional requirements (i.e. *"goldplating"*), which could lead to additional unnecessary costs for businesses.

- We do fully support the Commission's approach to apply a "*zero tolerance policy*" through infringement procedures in cases of non-compliance with the unequivocal obligations of the Directive (e.g. the prohibited requirements in Article 14). However, we strongly believe the Commission should dedicate the appropriate means to launch infringement proceedings concerning *all* key requirements covered by the Directive, such as those related to quantitative restrictions, tariffs or authorisation schemes, which clearly breach the Directive. These should cover requirements regarding both establishment and the temporary provision of services.

- We also believe it is positive that the Commission has launched a peer review (on Article 15 and 16) with Member States at the end of 2012 focusing on company structures, capital ownership requirements and the "*freedom to provide services – clause*" and keenly await its results in 2013.

- Although its scope is broad, the Services Directive does not cover a whole series of important requirements that directly affect services providers. Instead of reasoning in terms of separate legal texts and policy areas, the Commission should carry out further in-depth analysis of the practical functioning, including remaining problems and barriers of services markets in general and the real needs that exist on the ground. This analysis should also take into account all relevant areas not dealt with by the Services Directive, such as professional qualifications, posting of workers, the e-commerce Directive, consumer protection rules regarding the applicable law (Rome I and Rome II Regulations) or the jurisdiction of courts (Brussels I Regulation).

  A first step in this direction has been taken in 2012 with the "*performance checks*" in the construction, business services and tourism sectors. It is now time to go one step further. We need a truly ***integrated approach*** to services in Europe.

Reporting and measuring progress

- The Commission (DG MARKT) used to provide regular (in 2009 and 2010) public "*information notes"* to the Competiveness Council on "*the state of implementation of the Services Directive*", which put pressure on Member States to make progress. Regrettably, the Commission ceased to prepare these detailed notes, which included the mentioning of specific countries (*naming and shaming principle*).

- BUSINESSEUROPE urges the Commission to reintroduce this formal reporting to the Council, and also to the European Parliament, but on the broader topic of the state of the single market for services. Beyond quantitative implementation data, this reporting should also take into account the real results / functioning of services markets on the ground as well as the barriers and problems faced by businesses and consumers, also to create more transparency on the outstanding issues and better benchmark progress made. In light of the above, it is positive that from 2012 on, the Commission includes a services part in country-specific recommendations in the context of the European Semester, and also includes a specific services section in its annual report on the "*state of the single market integration*" which feeds into the Annual Growth Survey.

Scope

- The Services Directive does not cover all service sectors. The sectors it applies to represent a share of around 45% of EU GDP. The sectors not covered by the Directive are often covered by European sectoral legislation due to their specific nature or special characteristics, for instance in the area of financial services or certain social services.

- Currently, 90% of the services provided in Europe are already in some way covered by EU legislation. Services which are not covered by any EU legislation are often only provided locally and in most cases lack a cross-border dimension.

- BUSINESSEUROPE aims for a well-functioning European single market for all service sectors, regardless if they are covered by the Services Directive or any other horizontal EU instrument or more specific sector legislation. This should be a parallel process taking a true *single market perspective*. Examples of excluded sectors, where progress can be made are private security services, certain transport (e.g. urban transport and taxi services), healthcare and social services and temporary work agencies' services.

- In the above context, we urge national governments to re-focus on achieving high quality implementation, application and enforcement of the Services Directive in all Member States, and even though in future it should cover as many sectors as possible, we recommend not to revise the Directive at this stage.

Article 20 on "access to services"

- Article 20 of the Services Directive is an important tool to improve the functioning of the single market. It is also in the interest of businesses as service recipients to have access to services throughout the EU and not be subject to differential treatment in price or otherwise, or refusal of supply.

- Besides the criteria that may justify different conditions of access to a service applied by the provider mentioned by the Commission in its Staff Working Document, there might be other criteria not mentioned that have the same affect, such as language barriers or strategic promotional reasons.

- We agree that creating more transparency on objective reasons for differential treatment could be an alleviating factor for recipients' frustrations (consumers and businesses) for not having access to a certain service or receiving differential treatment.

- However, the Commission should be very careful with putting extra burdens on companies - especially in today's difficult economic circumstances - to explain why they do not deliver their service in a certain Member State, in particular for companies operating online (the sale of a good online is considered a service).

- Most businesses would be willing to enlarge their client-base and therefore their business to other markets where conditions make it possible and profitable. Whenever that does not happen, it is because of *objectively justified reasons* - often related to barriers in the single market - for which a company cannot be blamed. Therefore, not only would a company lose business opportunities because of regulatory barriers or other reasons for which it has no fault, but also it would have the burden (which is a cost!) to explain this to the public for the sake of transparency. This would severely harm SMEs and start-ups and even have companies refrain from offering or promoting their services online.

3. POINTS OF SINGLE CONTACT

- Companies can greatly benefit from the information and assistance provided by the Points of Single Contact (PSCs) set up under the Services Directive, but only if they truly relieve administrative burdens and respond well to the needs of their users. In particular, European businesses want PSCs that make their life easier by offering:

  - The possibility to complete all necessary procedures and formalities to provide a service domestically or in another Member State on a temporary basis or through establishment, entirely online through the PSC portal to save both time and costs.

  - This requires better cooperation between PSC management and the authorities responsible for final approval of these administrative procedures. In general, the PSC portals should answer any request as rapidly as possible. In many instances, automatic authorisation (i.e. tacit approval) after a certain period could offer a pragmatic solution.

  - More and accurate information on a wide variety of service activities, also including practical information needed for doing business, such as information on applicable labour law, tax and VAT rules, insurance, social security or on providing services in an online environment. This can already be partly achieved by creating links with websites of other relevant authorities, public bodies and information sources.

  - These PSC services should be offered in multiple languages to attract more foreign service providers and trigger investment. In addition, interoperability between the different national PSCs needs to be improved by offering cross-border e-signatures and user-friendly e-identification.

- BUSINESSEUROPE believes Member States must sign up to an ambitious "*PSC Charter*", which lays down quantitative indicators for better measuring progress made in improving the functioning and user-friendliness of the PSCs and offers transparency by regularly presenting the progress made.

- National governments should modernise and further simplify administrative procedures for service companies through better functioning PSCs, which positively affects the creation of new business and can provide gains up to 0.21% of EU GDP. Moreover, public authorities can cut costs by doing this and by making better use of e-government tools.

- There is a need to overcome technical barriers to cross border use of PSCs: Improve the interoperability of the different national PSCs by ensuring that e-signatures work well across borders and by setting standards for online identification and authentication.

- The European Commission, European Parliament, Member States and relevant stakeholders should better and more actively promote the PSCs and create more

awareness amongst the business community of the possibility to make use of PSC services. Therefore, it is very positive that the Commission has announced to launch a PSC communication campaign in 2013, supported by relevant stakeholders.

4. OTHER ISSUES TO BE ADDRESSED

1. **Make better use of European standards**: Voluntary services standards can benefit the services industry by reducing the number of (conflicting) national standards and thus removing potential trade barriers. However, the need to develop a certain horizontal service standard must be determined on a case-by-case analysis based on thorough impact assessment and must always be market driven, following a comprehensive consultation of relevant stakeholders.

2. **Ensure better recognition of professional qualifications**: The recognition of professional qualifications throughout Europe is fundamental for a well-functioning services industry as the free movement of labor is often a prerequisite for cross-border service provision and establishment abroad.

3. **Reduce the number of regulated professions and specialisations**: there is also a strong need to reduce the number of regulated professions in Europe (about 800 of which 25% are only regulated in one Member State) that are fragmenting labour markets, prioritising the professions and sectors which have the largest growth potential and are most regulated or only regulated in one Member State. For instance in Italy there are 27 professional orders (categories) and “guilds”. Each of these has its own particular codes which add organisational rules and behavioral limits to limits already imposed by the national and regional law. In practice, this makes it more difficult to provide services in Italy (and all other countries with such structures) for companies coming from other Member States.

4. **Address double insurance problems**: There is a need to further assess the issue of double insurance obligations, provide legal clarity in this area and put an end to double regulatory burdens. In some cases service providers adequately insured to provide its services in one Member State, also vis-à-vis foreign clients might be obliged to take an additional insurance in order to serve across borders. We also found that in some cases where service providers wish to obtain insurance in another Member State to be able to provide their services cross-border, they experience that it is difficult to find a proper insurance at market prices. The insurance offer seems very limited and the market is small or even non-existent. In some cases, enrolment in a foreign chamber of commerce or business register is a precondition for a company from abroad to obtain insurance. We welcome the Commission’s initiative to look into this.

5. **Enhance the mobility of service companies**: Heavy legal form and ownership requirements – that significantly differ between Member States - can hamper or even prevent establishment abroad. Therefore, following the ongoing Commission peer review with Member States on these matters, we urge the Commission to launch a thorough assessment of the proportionality of the existing rules in this area

as regards effects and aims, and their justification, monitored by the European Parliament. In addition, we ask for the removal of all obstacles to the exercise of professions in corporate form such as joint-stock companies.

6. **Promote the power of service innovation**: Service innovation can help Europe to transform and modernise the way products and services are offered, while driving up productivity and creating competitive advantages for companies. Competition is the best way to foster service innovation. Therefore, it is fundamental to remove remaining barriers in the single market to create a competitive and dynamic environment and to enhance other framework conditions through smart regulation, the availability of adequate funding and public procurement of innovative solutions. In this regard, it is very positive that scope of activities eligible for funding has been broadened in the Horizon 2020 proposals, also to foster more service innovation.

7. **Ensure better data collection and increase expertise on services**: Already in classical high school education, but also in universities throughout Europe, the focus of business and economy courses remains on the manufacturing industries. Yet, there is a need to inform people better about the important role of services for the competitiveness of the European economy.

   Still the data collection on the specificities of Europe's services sectors is scarce and economic analyses of the services industry much less advanced than for classical economic sectors, such as manufacturing, fisheries or agriculture. The basis of good European and national policies are facts and figures. A lack of this information will result in inaccuracies and possibly bad policy. There is a need to allocate more resources to the collection of relevant data. This might include new ways of measuring economic impact of services and their relation with classical industry as they can appear at any stage in the value chain and across all sectors of the economy.

   For instance, we have some idea of the quantity of services provided across borders, but we never measure the number of companies that have established themselves in another Member State, nor do we measure whether it has been made easier to start-up a business or subsidiary in another country. This is not reflected in any data or figures, while it would be very interesting to measure the number of true "*European companies*", i.e. businesses that have been set up in a country other than the home country of the entrepreneurs.

   In this context, BUSINESSEUROPE urges Eurostat but also universities, think tanks and other data collecting and research institutions to step up their efforts in collecting more precise data on Europe's services sectors.

8. **Further develop the Internal Market Information (IMI) system**: Public authorities should make better use of the IMI system to share information, not only for the recognition of professional qualifications, but also in new legislative areas, such as the Regulation on the cross-border transport of euro cash by road between euro-area Member States and others.

9. **Make retail services more competitive**: BUSINESSEUROPE welcomes many of the initiatives announced in the Commission's recent Retail Action Plan presented in February 2013 that also affect the broader functioning of Europe's services markets and aim to remove remaining barriers to the creation of an efficient and competitive single market in retail, but the effectiveness of many of the proposals will depend on its details and the follow-up actions. Therefore, we will closely monitor the implementation of the announced measures, as well as the conclusions of the permanent Group on Retail Competitiveness.

10. **Solve issues related to spatial planning**: We urge the European Parliament to ask the Commission to assess how commercial and palatial planning rules are applied by the competent authorities on the ground. We observe that in some cases service providers are hindered by disproportionate spatial planning rules, for instance by imposing economic needs tests or additional requirements, which are sometimes used in a manner that restricts competition and protects local interests.

11. **Enforce the Posting of Workers Directive without creating new barriers**: BUSINESSEUROPE strongly supports proper enforcement of the Posting of Workers Directive. But measures to improve enforcement should not impose disproportionate burdens on companies, and should not create additional barriers in the single market. Providing better information for companies and workers and improving administrative cooperation between Member States are the key to ensure better compliance with the Directive in practice. Imposing an EU system of joint and several liability in subcontracting is not the right way to enforce the Directive. Such a system will hamper development of the single market and undermine the competitiveness of European companies at a time when all EU policies should support economic growth.

12. **Reinforce the horizontal "mutual recognition principle" in services**: Trust and mutual recognition are essential elements of a well-functioning single market in services. In areas where full harmonisation is not desirable or feasible, *the principle of mutual recognition* can help to improve the functioning of Europe's services markets by providing a certain degree of flexibility and cross-border acceptance.

    More mutual recognition would also lead to a significant reduction of administrative and regulatory burdens – as business would have the possibility to provide their services in another Member States without additional formalities or heavy procedures as long as they comply with the essential national and European (safety, health, consumer protection, etc.) requirements. For example, more mutual recognition in areas such as expert accreditation, authorisations or the recognition of certificates can greatly facilitate cross-border service provision and establishment abroad.

13. **Boost the productivity of business services**: Many different services industries fall under the term "business services", including professional services (such as accountancy, legal, engineering, marketing, tax, management consultancy and architect services), but also IT, software services, technical testing, contract research, labour search services (such as temporary work and headhunting), industrial cleaning and security services. Business services are mostly provided to

other businesses, hence their importance for the overall competitiveness of the EU. Yet, the business services industry has booked no productivity growth during the last 2 decades, which is worrying. A lack of competitive selection contributes to the productivity stagnation. Actions need to be taken and BUSINESSEUROPE eagerly awaits the setting-up of the High Level Group on Business-Related Services that will analyse the shortcomings of this crucial sector for the economy.

14. **Ensure less complexity in the administration of tax for EU cross-border activities**: less complexity in the administration of taxes for both companies and citizens would enhance mobility and therefore benefit the free movement of services.

15. **Fully grasp the huge potential of online services**: The selling of goods online is considered a service. Hence, the (overall positive) impact that the rise of the internet and e-commerce in particular is having on existing business models and the daily operations of companies providing services. Yet, while e-commerce is rapidly taking off at national level, cross-border e-commerce is lagging behind.

    There is a strong need to boost consumer confidence and business trust in cross-border e-commerce by addressing the excessive fragmentation of applicable rules (e.g. different VAT regimes, data privacy, payment systems, consumer protection and product information), and apply an “e-commerce test” to all relevant new legislation. In addition, there is a need to reform the copyright system in order to create a real single market in this area, including for cross-border licensing and collective management of rights. Of course the digital world changes very quickly, so also the environment for providing online services. Policy-makers dealing with the Digital Single Market need to realise this and follow its pace. The entire approach to regulation needs to be proportionate, light touch and future-proof.

* * *

Balance of Competences

Response from Cammell Laird

Note – rather than respond to each specific question, the response is presented as an overall view and reflects the round table discussion on 14th November in BIS Offices, London

Cammell Laird is a ship builder, ship repairer, and heavy engineering company based in Merseyside, England. It operates in the Naval Defence, Commercial Marine, Renewables, and Oil and Gas sectors.

The EU represents a bigger market than just the UK so provided there is parity in bidding into this market it in theory should offer more opportunities.

In terms of defence procurement, we see little opportunity to bid into other European defence programmes– especially French or German so EU defence has to be equal in terms of opportunities. This gives rise to questions over "sovereign capability" and an assurance would need to be given that any bids we might submit into the EU would be reviewed on an equal basis with local bids. Inernational defence opportunities tend to come from developing nations, less so from EU nations.

UK national security would require to be protected which could give rise to difficulties on free movement of services. Each individual country will wish to make its own defence procurement rules appropriate to its own capabilities and capacities.

Outside of defence procurement, the threat of wider competition can make companies more innovative in order to stay competitive so could be an advantage. Indeed commercial marine business is competed at a world-wide basis let alone European basis. Free movement of services could be helpful to UK companies in this regard.

Free movement of services across the EU could offer benefits in say the civil nuclear programmes and in renewable energy programmes - such collaboration may be more difficult should we leave the EU.

Commonality in professional qualifications would be sensible in a wider EU market – indeed this exists for engineers with the introduction of the European Engineer Registration (Eur Ing). Obviously this would ease free movement of services by having a known basis from which to make decisions.

Many standards are already international so there should be no issues regarding this.

The laws of the specific countries in which services are being transacted will inevitably be different and so will add cost and time delays to free movement of services.

Review of the Balance of Competences

Submission by David Campbell Bannerman MEP for Business, Innovation and Skills: Single Market: Services

This Submission proposes a new relationship for the UK with the EU outside of EU membership entitled 'EEA Lite'; one which lies between Norway's EEA Agreement and Switzerland's bilateral agreements (closer to its proposed new framework agreement). EEA Lite would maintain access to the EU Single Market for UK Exporters whilst allowing the UK to save EU gross membership contributions of £20 billion a year and by leaving the EU Single Market, allow substantial reduction in EU red tape for the 92% of the UK economy that is not involved with trade with the EU (8% of UK economy is involved with trade with the EU and 12% with the Rest of the World and rising). The benefits of EEA Lite are tailored to each FCO request for submissions. Fuller details on EEA Lite are available on the www.timetojump.org website.

There are well over 150,000 pages of EU laws in the form of regulations and directives, to say nothing of ECJ directives and decisions, which have legal force in the UK. In 2006, the then EU Commissioner for Enterprise and Industry, Gunter Verhuegen, estimated that the EU laws cost European business €600 billion a year in which it can be estimated that the UK share was £56 billion.

This was EU regulation equivalent to 5.5% of the EU GDP or the size of the Dutch economy. For the UK, the think tank Global Britain estimated in 2009 the cost of EU regulation was £98 billion or 7% of UK GDP.

Open Europe noted that the UK Government's regulation had cost the UK economy a cumulative £176 billion by 2009 of which 71% had its origin in EU legislation. In 1994, the full impact was summed up by Ian Milne at £20 billion annually. In 2004, Peter Mandelson put the cost of EU red tape at 4% of EU GDP or €421 billion. The UK share of this massive figure was estimated at £49 billion.

As Brian Binley MP and Ruth Lea point out, the Single Market is not intended to be a free trade market but follows the 'Continental Social Market Model, which is characterised by heavy employment regulations (social protection) and trade protectionism (especially in France)'. In 2009, the TaxPayers' Alliance put the EU regulations figure at £118 billion per year.

If the UK was to leave the EU and instead have an alternative set-up such as an EEA Lite Agreement that would mean the following for the Single Market and Services:

• Leaving the EU Single Market, but retaining full access to that market for UK Exporters of Goods and Services, recreating a UK Customs Union and restoring British control over the UK Domestic Market; the sixth largest economy in the world. According to the EU Commission's own figures, the Single Market costs two and half times more than it benefits the member states, a 2009 book 'The Great European Rip-off' by Matthew Elliott and David Craig estimated that the Single Market cost some £118 billion a year. That is equal to £1,968 for every man, woman and child in

UK and in every one of Britain's three historic applications to join the EEC the Treasury warned that this Single Market would be a cost to the UK;

• The ability to stop, repeal or amend up to 92% of EU laws that do not relate to access to the EU Single Market. This gives the UK the ability to slash much of the £118 billion cost of EU Regulation applying to the majority of the UK economy not related to exporting to the EU, as proposed under EEA Lite. Even the French acknowledge that EU over-regulation is damaging: according to the Conseil d'Analyse Economique - which reports to the French Prime Minister – over-regulation is a major factor in the EU's decline compared with the Rest of the World. The EU body of law (the 'acquis communautaire') now runs to 35 chapters and 150,000 pages;

• Freedom to save the NHS from EU threats to undermine it by harmonising healthcare across the EU, and to reduce welfare payments to non-UK EU citizens Free of the EU, the UK will no longer have to comply with EU Directives moving healthcare towards a common European model at the expense of the NHS, which is very different from the more private insurance-based health system models in place in much of the EU. The NHS will no longer be required to treat EU citizens without charge, only UK citizens unless the EEA Lite agreement specifies otherwise but health tourism will be stopped. Open ended access such as that implied by the Cross-Border Healthcare Directive will also be subject to repeal.

• Under the EEA Lite agreement, the UK will opt in to such agencies as the European Centre for Disease Prevention and Control, the European Food Safety Agency and the European Medicines Agency. Other relevant EU directives having severe impact on the NHS such as the Working Time Directive, which surgeons blasted as costing lives by undermining the British system of medical training, could now be removed. There could be an end to the disgraceful 'dumbing down' of medical standards and exposure of British patients to under-qualified personnel forced by EU rules. In the past, this has led to such cases as Doctor Ubani and the overdose and death of a British patient. The Cambridgeshire North and East Coroner, William Morris, judged Dr Ubani to be 'incompetent' and the death was an 'unlawful killing'. The GMC Confirmed that, in April 2011, a Spanish locum who had mistaken cancer for a sore throat was struck off. In addition, there was a huge rise of EU nurses whose skills and ability to speak English are unknown thanks to EU rules banning proper competency checks on EU citizens. This open door policy will be ended, putting organisations such as the General Medical Council back in control of British standards to protect patients.

• The UK securing full national control and sovereignty over defence matters, including defence procurement and leaving embryo EU Single Armed forces, including EU Battle Groups, whilst strongly enhancing NATO and other intergovernmental participation, and the ability to spend billions more on UK defence forces from saved EU membership contributions;

• Ending the gradualist integration of UK armed forces into a single European armed forces and united military command organisation - which is a declared EU end objective (the 2013 Koppa report for example calls for a single operational EU HQ, a

‘Permanent Structured Co-operation among Member States’ (PESCO) and a ‘continuous process’ of defence co-operation);

• The ability to avoid loss of thousands of highly-skilled UK defence jobs and export opportunities under EU defence procurement policies which aim to spread procurement around the EU and to undermine UK and French dominance, such as the 2013 Gahler
Report which advocates common EU defence procurement and a single EU Defence Industry;

• Avoiding the risk of being automatically dragged into a future foreign intervention blunder by EU leaders who, on the one hand, undermine proven NATO defence through unnecessary co-operation and duplication whilst, on the other, being unable to deliver equivalent vital assets or organisation;

• Reaffirming NATO as the cornerstone of a capable Western alliance, with full participation by the US and Canada and not EU Armed forces. But EEA Lite opts out of the EU’s dangerous ‘Mutual Defence’ clause which is less conditional than NATO’s ability to decide on ‘such action as it deems necessary’, and ill defines what the EU means by a ‘terrorist attack’ (could this be a freedom movement against the EU for the sake of argument?);

• Securing the UK’s highly privileged access to US technology and equipment, such as stealth and cruise missile technology, generally well in advance of European counterparts, with the UK’s BAE Systems being a prime US supplier. The US ITAR exemption, for example, allows the UK increased privileged access to US technology, under the proviso that it is not re-exported. This would be at risk from continuing EU defence involvement;

• Greater freedom to avoid costly European Union procurement bungles;

• Continuing the UK’s privileged access to US secrets and intelligence;

• Maintaining the freedom to co-operate bilaterally with the French and other European allies where our needs cross, such as over UK co-operation with the French over Libya and Mali, and Anglo-French co-operation over excellent military equipment such as the Puma helicopter and Jaguar jet;

• options on closer Commonwealth co-operation on defence matters such as shared defence procurement on military equipment and communications, including warships and military aircraft;

• The opportunity to leave the muddled EU Agency, the European Defence Agency (EDA), as EEA Lite proposes, with its interference in capabilities, procurement and Research and
Development;

• The opportunity to leave the EU’s white elephant Galileo Space Programme and the related GNSS Agency, as advocated under EEA Lite, and for leading British

scientists to be redeployed to more successful global areas in partnership with Commonwealth nations such as India and Canada;

• Withdrawing from excessive EU Health and Safety legislation improperly applied to military matters, such as human rights, equality, driver training, working time and waste disposal legislation, which compromises UK military effectiveness;

• Some valuable financial savings and red tape cuts.

Other points in the Defence area include:

• The Koppa Report of September 2013 calls for a Council of Defence Ministers at EU level, a single operational EU HQ, a 'Permanent Structured Co-operation among Member States'
(PESCO), a 'continuous process' of defence co-operation and more EU funding for EU battlegroups. This is in preparation for the EU Council of December 2013 which for the first time had formal discussions of Defence matters. Under EEA Lite, the UK would regain full national control over Defence matters.

• The Gahler Report of September 2013 is now pushing for integration of military resources – a single European Defence Industry. To the Author, who serves on the Security and Defence Committee, this smacks of the European Coal and Steel Community in its aim to pool the instruments of war: steel, and now all European defence procurement, so presumably that no individual EU nation would have the sole independent capability to defend themselves. Under EEA Lite thousands of jobs in the UK Defence Industry and important UK exports of defence products would be saved by leaving the Common Procurement Policy.

• The wasteful and damaging duplication of control and assets with NATO by the EU, such as EUNAVFOR's 'Atalanta' mission and NATO's 'ocean Shield', both of which the Author has visited, which have much the same counter-piracy objectives, often use NATO assets and are located literally within walking distance of each other.

• For Britain, however, developing an integrated capability rather than a structure of alliances is quite clearly establishing costs far greater than the benefits. A Franco-British military partnership might have some advantages but a European Defence initiative is quite different as it will threaten the UK's relationship with the US. For example, the UK's leading defence manufacturer, BAE Systems, has more of its turnover accounted for by US military business than by EU business.

• The EU's own strategy of political integration benefits greatly from European defence cuts. They reinforce the impression that no nation can go it alone but must 'pool and share' resources with other EU members so none can act individually. It thus justifies the claim for more EU Battlegroups and EU operational headquarters. It is a vicious circle that will destroy Britain's freedom to protect territories such as the Falkland Islands and Gibraltar.

• EU Battlegroups consist of at least 1,500 combat soldiers. There are increasingly hectoring and scary EU demands to 'use' EU Battlegroups - presumably in action. The system is profoundly flawed as it gives a contributory state a veto on

intervention regardless of the views of its EU colleagues. In some cases it grants an effective operational veto to non-EU members as NATO nations have also contributed troops. It should be ditched in favour of NATO's Response Force which is larger and more effective.

• From a strategic perspective, seeking to tie the UK to a developing EU defence capability risks abandoning the freedoms currently enjoyed under an intergovernmental system. It also will inevitably undermine US confidence in the UK's ability to keep shared intelligence, such as stealth, cruise missile and nuclear weapon technology secret.

• Under EEA Lite, the United Kingdom will be able to extricate itself from EU defence integration, and rely more on the NATO framework, on developing Australian, Canadian and Indian associations, and on bilateral arrangements.

• EU countries have two million men under arms but only 3-5% of these EU personnel (60-100,000) could actually be deployed for any length of time at any reasonable distance, so displacing NATO is near certain to weaken European defence, not strengthen it.

• The estimated bill running a distinct EU Common Defence Policy has been calculated at currently running at around €932 million per annum (£777 million), which is in addition to direct national military expenditure. About 60% of this bill is due to the Galileo Satellite Programme which is seeking to rival the US GPS, but is not as capable or effective.

• Galileo is actually a spectacular white elephant with the latest budget phase up to 2014 was last estimated to be at running at €3.4 billion, but considered to be facing significant shortfalls. By 2008, the development cost had already reached €14 billion, with cost overruns of €1.76 billion for the first third of the budget then spent.
• Under EEA Lite, the UK should quit this programme and seek to foster links with nations such as India which has its own space programme and satellite launch sites.

• There are a wide variety of European procurement projects that have encountered problems such as the Eurofighter (Typhoon) with its cost issues arising from cuts in orders by participating states, notably Germany; the METEOR missile system which had the same issues; the Horizon frigate system from which the UK withdrew and was intended in any event to carry the wrong missile system, and the TRIGAT helicopter missile from which the UK also withdrew after failures.

• Only an independent UK can protect its defence links with the US. In 2012, the UK was awarded ITAR exemption, allowing for increased privileged access to US technology, under the understandable proviso that it was not re-exported. Only Canada and Australia share this level of access with the UK.

Timeline of European Defence Integration

1947
Anglo-French Treaty signed at Dunkirk, targeted at future German aggression.

1948
Treaty of Brussels expands membership of the Anglo-French Treaty, leading to the Western Union Defence organisation.

1949
NATO formed.

1950
Pleven Plan mooted for a supranational European Defence System (common forces, defence budget and armaments industry) incorporating Germany. Fails.

1951
European Coal and Steel Community established. Basis of military industrial production internationalised.

1954
Proposal for a European Defence Community (EDC) rejected by French National Assembly. Germany allowed to enter the WEDO (becoming the WEU), and focus on European integration shifts to economic issues.

1955
French policy failure to militarily suppress German industry evident. Occupation Zones end; referendum failure to detach Saar to French rule.

1956
Suez Crisis. Anglo-French military co-operation ends in fiasco, different strategic conclusions reached. French premier briefly offers UK-French political union as per 1940 proposal, which is not pursued. UK grasps for rapprochement with Washington, French grab at EEC.

1960
Fouchet Plan proposes wider co-operation on issues including Defence and Foreign Policy, a more intergovernmental approach and outside of the EEC. Rejected. Major pause in European defence integration - to last three decades.

1963
Élysée Treaty confirms French policy is now to chain France and Germany together.

1966
France withdraws from NATO's integrated command.

1967
Following a British proposal, NATO forms the EUROGROUP committee to improve coordination of the Continent's members.

1984
WEU re-launched in order to improve NATO co-operation with neutral states.

1986

Westland Affair under Thatcher Government, essentially over creating a European trade barrier for military helicopters and a US or EU directional choice. Heseltine and Brittan both resign.

1988
Kohl and Mitterand agree in principal to closer Defence structural co-operation.

1990
Reunification of Germany as Soviet threat recedes. European Defence Budgets cut in the context of a world recession.

1991
Franco-German Security and Defence Council becomes operational.

1992
La Rochelle summit. French and Germans establish Eurocorps. Maastricht Treaty clauses on Common Foreign and Security Policy: a Common Defence Policy which might in time lead to a Common EU Defence. Includes provisions for enhanced co-operation in the field of armaments, with a European Armaments Agency an option. EMU criteria place further demands on Defence budgets. War in Bosnia: alternating WEU/NATO-flagged Adriatic blockade begins. Council of the WEU sets out Petersburg tasks, effectively putting the WEU at the service of EC policy decisions.

1993
British and French airborne and marine elements ‘twinned’. WEU sets up Western European Armaments Group. EURAC, European Air Chiefs’ Conference, set up.

1994
Franco-British Air Group formed. Eurocorps parades in Paris.

1995
Ad hoc EU working group on a European Armaments Policy first formed (POLARM).

1996
OCCAR formed. Franco-German summit at Nuremburg declares, “In the European Union our two countries will work together with a view to giving concrete form to a Common European Defence Policy and to WEU's eventual integration into the EU.” It also pledges that Germany would be consulted before French nuclear weapons were used.

1997
France’s Europe Minister calls for the extension of the Franco-German “Common Concept” on Security and Defence to the whole of the EU. The Amsterdam Treaty formalises the role of the WEU previously agreed, and adds “peace-making” to the treaties. Principle of QMV attached. Royal ordnance closure at Bridgwater after a takeover by a French company removes the last British manufacturer of high explosive. An attempt by GEC to take over

Thomson-CSF on the other hand is blocked. EU Commission highlights aerospace industry (including electronics and missiles) as a target for consolidation and restructuring in the face of US competition.

1998
First Common Code of Conduct on Arms Exports. Poertschach meeting: UK haltingly endorses separate European Defence activity. St Mâlo summit driven by Tony Blair: Anglo-French bilateralism advanced, but at the cost of lifting the UK veto on EU Defence Integration. EURAFA: Commandants at European Air Force Academies Conference (21 members) agree to working group developing Common Training.

1999
Cologne Council commits to EU Defence and Security capability. More harmonisation, especially in intelligence, strategic transport, command and control, Defence planning and procurement. Standing EU bodies authorised. Countries asked to 'pre-identify' deployable assets. Helsinki Council establishes the target of a combined 'hatted' (but not standing) resource of 60,000 men to achieve EU military policy. A Political and Security Committee,
Military Committee, and Military Staff are also formed.

2000
WEU formally incorporated into EU structures, including its satellite centre. Feira Council: 5,000 deployable Gendarmes added to the asset list. MEPs call for AWACS and carrier groups to be added, and a European Security College to be founded to "foster a Common Culture", coupled with a specific information policy to sell this to the public in the EU and neighbouring states. Prodi gaffe: "If you don't want to call it a European Army, don't call it a European Army. You can call it 'Margaret', you can call it 'Mary-Anne', you can find any name, but it is a joint effort for peacekeeping missions".

2001
EU Institute for Security Studies established.

2002
European Convention first inserts Space into draft Community competences. Berlin Plus agreement creates mechanisms for EU to access NATO assets.

2004
European Defence Agency founded. EUFOR takes over from NATO in Bosnia. Anglo-French agreement on sharing Caribbean naval patrolling duties.

2006
EU Congo Force established.

2007
Treaty of Velsen sets up a European Gendarmerie. EU Chad Force established.

2009

Lisbon Treaty expands upon EU Defence institutions especially in procurement, introduces what amounts to a mutual Defence clause, and greatly boosts the post and profile of the CFSP manager, the High Representative Baroness Ashton

2010
UK-French military agreement, including on sharing of in-flight refuelling capabilities

2011
Libya Crisis, NATO lead and primarily an Anglo-French not EU operation.

2013
Mali situation. French take unilateral action with some UK support; EU provides later limited training: an example of high profile but low-engagement EU activity. EAS indicates intent to post Defence Attachés in their embassies. Former Kohl adviser regrets EU forces and flag not used in Mali. Koppa and Gahler Reports push to enact common military dimension of Lisbon Treaty.

EEA Lite Explained

The EEA Lite Agreement proposed is thus legally feasible. It parallels many aspects of the EEA Agreement in terms of institutions and relationships but contains fundamental differences in terms of its treatment of the EU acquis and free movement of persons.

I present here a new model of association with the EU, which I have called in somewhat marketing parlance, 'EEA Lite', in contrast to the existing, full 'regular' EEA Agreement. These sorts of models of association are legalistic, technical and not very people friendly, but EEA Lite is designed to sit somewhere between the successful but over-prescriptive EEA Agreement launched in 1994 post the EU single market and the Swiss-style set of bilateral agreements, which are far more democratic but less structured, more idiosyncratic, and less clear institutionally in terms of surveillance and dispute resolution and provide only agreed sectoral access to the EU single market through additional agreements.

I am seeking to suggest a viable option, to show that the model is pretty much in existence and proven now and can be readily adapted, and to demonstrate how that option could unlock a great deal of benefits for the UK in terms of greater freedoms, opportunities and reduced costs - whilst maintaining friendly relations and full access to the EU single market for UK exporters of goods and services. What I have subsequently been surprised at is how comparatively straightforward the proposed amendments are. For example, the EEA Joint Committee between the EU and EFTA nations and the EU-Swiss Joint Committees are up and running and the notion therefore of an 'EU-UK Joint Committee' handling an EEA Lite Agreement would be comfortably based on proven practices and existing, successful operating institutions and procedures.

In setting out a strong case for a new Negotiated out relationship with the EU, I am not necessarily ruling out a Renegotiated In. It is true that I believe personally it is easier to negotiate an acceptable new deal for Britain under a legal exit framework agreed under EU law – Article 50 of the Lisbon Treaty – and using a revised version

of an agreed and operating EU Agreement with European states – the EEA (Lite) model – than to seek to negotiate substantial return of powers from within the EU. Even avowed Federalists fear renegotiation and would prefer the UK to withdraw, their nightmare being that powers offered to one major member would open up a can of worms, which emboldens every member to seek some renegotiation of powers. But it is legally and technically feasible to renegotiate powers from the EU as part of a new Eurozone Treaty – after all it is a negotiated Protocol (an annexe or amendment) in the Lisbon Treaty that has allowed the UK the chance to opt out of 130 Justice and Home Affairs measures such as the European Arrest Warrant, and the effect is similar to taking the UK towards an EEA Agreement position in this one area of Justice and Home Affairs. So if the EEA Lite model and arguments here help deliver an EEA Lite position but carved out from within the EU, then that might be acceptable, though it is my belief that it is time for Britain to end all EU fudges and have the courage to opt for a sustainable and liberating form of independence.

EEA Lite is a more flexible version of the existing EEA Agreement signed between three EFTA states and the EU on 1st January 1994. This EEA Agreement I term 'EEA Regular'.

'EEA Lite' differs from EEA Regular in 3 critical respects:

1) The UK will remain a member of the European Economic Area but will leave the single market ('Internal Market') itself – i.e. the UK single market will no longer be part of the EU single market but will remain fully open to goods and services from the EU under this agreement, whilst UK goods and services exported to the EU will still be subject to EU single markets rules for the 8% of the British economy that trades with the EU, but the UK will be able to remove these rules for the 92% of the UK economy that does not relate to EU trade, and 80% of which is trade within the UK. This is more relevant to the UK as the Norwegians export to the EU five times per head more than the UK, and the Swiss three times as much per head.
For these reasons and also for reasons of the sovereignty concerns expressed by the Swiss, the UK will no longer seek to be part of a 'homogeneous European Economic Area based on common rules' but be fully open to the rest of the EEA in terms of trade, but with only UK exporters adopting EU common rules and homogeneity. UK standards, such as imperial measurements, would be restored within the UK single market and UK trading standard officers would enforce UK standards and not be agents of the EU. The existing EEA Regular agreement already allows members to retain their own customs unions. Other non-trade and non-essential aspects such as over social policy would be removed from the agreement, and be decided at national level.

2) The UK will be able to repeal existing EU legislation (Acquis Communautaire) and no longer be required to enact new EU legislation, as the UK Parliament thinks fit for the 92% of the UK economy that is not concerned with trade with the EU. This will bring huge economic benefits within the UK from cutting back over-regulation assessed at £118 billion a year, such as excessive social, employment, health & safety legislation – a sum equivalent to the NHS annual budget. The UK would also end its membership contributions to the EU of £20 billion a year (£12.2 billion net), though it will make contributions separately through a new UK Grants body to assist

Eastern European states to develop.

3) This agreement will bring the UK closer to the Swiss position on immigration opt outs, enabled by safeguard clauses in the 1999 EU-Swiss bilateral agreement, and also determined by Swiss referenda. These clauses allow restrictions on long-term residence permits for different EU nations (Bulgaria and Rumania are very strictly restricted, the newer 8 EU nations restricted from April 2012 to a cap of 2,180 for 12 months on B permits granting foreign nationals residence status for 5 years, but with older 17 EU nations much less restricted with a cap of 53,700 for 12 months) once a certain worker limit is reached. The caps do not apply to short term residence visas of up to a year, and is estimated to have reduced numbers of mainly low skilled East European workers by 4,000-5,000 plus some dependants. There are no such visa restrictions on citizens from 15 member states such as Germany, France, Britain, Italy, Spain (these countries have unrestricted access to the Swiss labour market). Reuters reported the reasoning was that, “Prosperous, non-EU Switzerland has seen the net influx of workers rise to up to 80,000 a year, contributing to a house price bubble and prompting criticism from right-wing parties.” This shows what a helpful control lever the visa system provides, though the EU reaction was predictably hostile: Baroness Ashton claimed it was “a breach of the Agreement on the Free Movement of Persons as amended by the Protocol of 2004. The agreement does not allow for any differentiation between EU citizens.” One in 4 people living in Switzerland is a foreigner, 1.87 million with over 1.2 million from EU states so the country is clearly not anti-immigration. EEA Lite would amend the 4 key freedoms to replace the Freedom of Persons by a Freedom of Workers.

This Freedom of Workers refers to those who contribute to national insurance and healthcare provision or who are studying in the UK, and allows for a visa system for individual EU countries, but removes any automatic right to entry to the UK or to receive UK benefits merely because they are EU citizens. There will also be more restrictions on the self-employed where the intention is to evade UK visa controls and/or UK taxation. In addition, there will be quality checks from UK professional bodies, such as the British Medical Association (BMA), when it comes to the mutual recognition of diplomas, certificates and formal qualifications to ensure that British residents are not exposed to dangerous practices such as over the Dr Ubani case with the deaths of patients such as Mr Gray in my constituency, where the doctor concerned should never have been allowed to practice in the UK.

Key Points about EEA Lite

• EEA Lite builds on the existing freedom of control offered by the EEA Regular Agreement:
Freedom of control over Agriculture/ Fishing / Justice & Home Affairs (but opting in to special policing agreements such as over Europol co-operation separately, and leaving the European Court of Human Rights, which while being separate from the EU, membership of which is now required for members under the Lisbon Treaty) / Foreign Affairs & Defence / the Customs Union / over Economic and Monetary Affairs, and Trade (using EFTA). To these powers, EEA Lite adds back national control over Immigration and Borders, and control over many single market related areas such as Social policy, Employment, Health & Safety and Financial Services. EEA Lite confines the UK’s relationship with the EU to that of trade and access to the

'common market'/EU Internal Market with friendly economic and cultural co-operation. These aims were all the British people wanted in the first place.

• The UK would rejoin the EFTA Council, its ruling body, as a member. The UK would sign the updated EFTA Convention, ensuring free trade between EFTA countries including Norway, Switzerland, Iceland and Liechtenstein (this the UK helped create in 1960), in a separate agreement to the EEA Lite model.

• The UK would regain its individual national seat and voice at the World Trade organisation (WTO), already enjoyed by EEA States and Switzerland, and which it is presently barred from doing by EU membership, thereby enhancing its international status and influence. The UK would either sign up to EFTA's range of 26 FTAs covering 36 nations (33 outside the EU including Canada, Gulf Cooperation Council, China (Hong Kong plus the mainland for Switzerland and Iceland), Singapore, South African Customs Union covering 680 million consumers outside the EU), or retain existing EU 53 FTAs amended for the UK and then negotiate new FTAs through EFTA but with the UK in control of the ultimate decisions on the negotiations.
UK control of free trade agreements would ensure they are truly free trade, and remove the EU's increasing political and social control over trade agreements – such as the sustainability clause regarding human rights demands and emissions targets, which do not belong in agreements meant to further jobs and investment.

• The EU and UK would establish a new EU-UK Joint Committee - along the lines of the EU-Switzerland Joint Committee, founded in 1972 as part of the free trade agreement with Switzerland, and which has met nearly 60 times over 41 years - to handle issues of trade and relations between the EU and the UK.

• The UK would not join the existing EEA Council nor the EEA Joint Committee, as these bodies oversee the existing EEA Regular Agreement, but attend these meetings as the Swiss do, both in a representational capacity when it comes to discussion of EEA Lite Agreement matters, and as an observer on EEA Regular Agreement matters.

• The UK would form a new, independent UK Surveillance Authority, similar to the EFTA Surveillance Authority and the proposed new Swiss Surveillance Authority (proposed on 20th March 2012), to oversee the implementation of the EEA Lite Agreement in the UK in a non-partisan manner, but without being subject to non-British remote oversight such as the EU Commission.

• The UK would establish a new UK Trade Court, similar to the EFTA Court, to rule on any trade, competition, Intellectual Property or similar disputes under this agreement. The Court may take into account judgements of the European Court of Justice (ECJ) and the EFTA Court by means of informed opinion, but would not be bound by those Courts. There shall be an ultimate appeal to the UK Supreme Court, building on the UK's fine international tradition of an independent judiciary. This is similar to proposed new arrangements in Switzerland.

• The EU and UK would form a new EU-UK Joint Parliamentary Committee, along the lines of the EEA and Iceland Joint Parliamentary Committees, which shall be

composed of EU MEPs and British Westminster MPs and Lords to help oversee the smooth workings of the EEA Lite Agreement.

• The UK would in principle seek to continue to provide support for the 'reduction of economic and social disparities' within the EEA area but through a non-EU mechanism directly under UK control. Similar to the Norway Grants and EEA Grants body the UK would establish a new UK Grants body which would dispense UK grants to worthy causes directly and not be paid through the wasteful and fraudulent EU system. The value of these contributions would be negotiated in a separate agreement with the EU, just as Norway and the EEA negotiate such voluntary contributions. They would not be express terms of the EEA Lite Agreement.

• Just as EFTA countries sign up to certain EU Programmes and contribute expertise and financial contributions, so would the UK sign up to EU Programmes where the UK Parliament thought it desirable. A list of EFTA participation and proposed UK participation is shown below The EU Programmes the UK may decide to keep within are proposed to be:

- The Seventh Research Framework Programme (FP7)
- Competitiveness and Innovation Programme
- Lifelong Learning Programme
- Erasmus Mundus II (Actions 1 and 3)
- European Statistical Programme
- European Institute of Innovation and Technology
- Intermodal Transport (Marco Polo II)
- Civil Protection Financial Instrument
- Implementation and Development of the Internal Market
- Consumer Programme
- MEDIA Mundus Programme
- Drugs Prevention and Information Programme
- Modernisation of EU Enterprise and Trade Statistics (MEETS)

It is not proposed to continue with EU programmes with current EFTA state participation in fields of: Lifetime Learning Programme (e.g. ending Jean Monnet scholarships), Galileo Programme (Norway only), Youth in Action, MEDIA programme, Employment and Social Solidarity (PRoGRESS), Culture Programme, Programme of Community Action in the field of Health, European Employment Service (EURES), Fight Against Violence (Daphne III), Interoperable Delivery of European eGovernment Services to Public Administrations, Businesses and Citizens (IDABC), Safer Internet Plus Programme, Marco Polo Programme.

• Just as EFTA countries sign up to certain EU Agencies and are involved in their operation and assist with financial contributions, so the UK would sign up to supporting certain EU Agencies where the UK Parliament thought it desirable. The EU Agencies the UK may decide to keep supporting are those primarily to do with trade or activities spreading across European borders, and these are proposed to be:

- The European Aviation Safety Agency
- European Centre for Disease Prevention and Control
- European Chemicals Agency
- European Food Safety Agency

- European GNSS Agency
- European Maritime Safety Agency
- European Medicines Agency
- European Network and Information Security Agency.

It is not proposed to continue with EU Agencies with current EFTA state participation in fields of: the European Agency for Safety and Health at Work, European Centre for the Development of Vocational Training, European Environment Agency, European Foundation for the Improvement of Living and Working Conditions, European GNSS Agency, and the European Railway Agency.

• The UK would seek to continue to influence the EU legislation now limited in effect to the 8% of the British economy that trades with the EU. As with EEA States, the UK would influence EU legislation at an early stage by participating in the EU Commission's comitology committees on new legislation – as EFTA states sit on 500 comitology committees and expert groups and who have 1,500 organisations, public bodies and entities participating in EU programmes (such as 15,000 students who have studied through Erasmus), but on a reduced scale owing to a reduced commitment to such programmes and agencies.

The EU Commission will also be duty bound under EEA Lite to seek advice from UK experts in as wide a participation as possible, and on the same basis as EU member states experts, and transmit this to the EU Council as necessary. The legislation will then be examined by an exchange of views at the EU-UK Joint Committee, and be further discussed at significant moments in what is described as a 'continuous information and consultation processes. The fact that the UK will be able to set its own legislation for the UK single market again, as the US, Japan, China and other nations do whilst trading with the EU without tariffs, will in itself be influential on EU legislation that departs greatly in scope and cost burdens from UK domestic legislation.

• The UK would also participate in the Standing Committee of the EFTA States and its working groups, as required. The main features of the EEA Lite Agreement, which include modifications to the EEA Regular Agreement, include: The UK will leave the European Union as a member and rejoin the European Free Trade Area (EFTA), which the UK co-founded in 1960 to counterbalance the formation of a more protectionist European Community. The UK and EU will enjoy the benefits of trade and economic cooperation.

The EEA Lite Agreement will remain true to the main features of the EEA Regular Agreement. It shall:

• Secure the main Objectives of the EEA Agreement: the 4 Freedoms: Freedom of Goods, Freedom of Services, Freedom of Capital and Freedom of Peoples - but with caveats that make Freedom of Persons essentially a Freedom of Workers, for workers and students, and introduce a new visa system for EU citizens, where required, and restrictions on welfare benefits limiting them to a contributory basis only.

• Ensure competition is not distorted and the rules are equally respected.

• Deliver close co-operation in other areas such as research and development, education and the environment.

• Work to World Trade Organisation guidelines such as the World Customs organisation's Harmonized Commodity Description and Coding System and Rules of origin (i.e. establishing where goods were made where multinational input).

• Be subject to a 2 year review period.

• Be a customs free area.

• Have no quantitative restrictions on imports or exports (i.e. no quotas).

• Allow prohibitions or restrictions based on grounds of public morality, public policy or public security, on health grounds, national treasures or protecting industrial or commercial property, but without arbitrary discrimination or disguised restrictions.

• Not allow internal taxation as means of protectionism.

• Not allow discrimination by State monopolies, or any unfair State trade practices.

• Simplify border controls and correct customs law application.

• Support Freedom of movement for Workers: to allow workers to accept offers of employment, to move freely in the EEA area for this purpose, to stay in a state for that purpose, though public sector employment is excluded, but not to remain in a state having being employed there automatically and no right to benefit unless entitled to by contributions made and not applying to self-employed if for the purposes of avoiding visa controls and UK taxation.

• Not discriminate against workers based on nationality.

• Ensure mutual recognition of diplomas, certificates and evidence of formal qualifications but subject to agreement of UK professional bodies as to what qualifies on mutuality to ensure proper standards are maintained.

• Not allow restrictions on right of establishment of companies in EEA member states, and have no discrimination on grounds of nationality, with exception of special treatment being allowed on grounds of public policy, security or public health.

• Have no restrictions on right to provide services within EEA states ad pursue the provision of service under the same conditions as a State's own nationals.

• Allow no restriction on the movement of capital belonging to persons resident in EU Member states or EFTA States such as the UK, with exceptions where movements of capital could lead to disturbances in the functioning of the capital markets or if a state is in difficulties such as suffering disequilibrium in balance of payments.

• Support an exchange of views and information, and discussions, regarding integration of economic activities and the conduct of economic and monetary policies on a non-binding basis. This is in marked contrast to ongoing economic and fiscal union in the Eurozone region.

• Allow some transport coordination measures, where necessary, such as no discrimination against carriers on grounds of country of origin, or subsidised operations and no charges or dues for crossing borders.

• Not allow the prevention, restriction or distortion of competition by undertakings (businesses), such as through fixed purchase or selling prices, market limits or controls, unfair selling prices, limiting production or other such devices. Infringements by businesses or by a State are subject to investigation by the surveillance authority, such as by the proposed new UK Surveillance Authority. Concentrations are controlled.

• Not allow State Aid that distorts or threatens to distort competition by favouring certain undertakings or production of certain goods – these are considered incompatible with the agreement unless aid is social and non-discrimiNATOry, for natural disasters etc. Aid is allowed to promote economic development in areas with low standard of living / high unemployment, to assist certain economic activities or areas, or where of vital national interest or in other special cases. This to be constantly reviewed by the surveillance authorities, including the proposed UK Surveillance Authority with appeals via the EU-UK Joint Committee to seek fast remedies. Rules apply to Public Procurement and to Intellectual, Industrial and Commercial Property.

• Delete the EEA's Social Policy provisions from EEA Lite on the grounds that this area is not directly about trade and should be left to the nation state to decide. Deletions include areas of health and safety law, labour law, employment law, pay discrimination and national minimum wage setting which are all to be decided in the UK.

• Have consumer protection provisions.

• Agree broad environmental objectives such as preserving, protecting and improving the quality of the environment, on human health, ensuring a prudent and rational utilization of natural resources, based on principle of taking preventative action, reducing environmental damage and the polluter paying. But EEA Lite will ensure environmental action in the UK becomes a UK sovereign matter again, including setting of any UK environmental targets, in line with international agreements and not be dictated by EU-wide targets and agreements. Environmental and Energy policy will no longer be an EU competence in the UK.

• Ensure that the Contracting parties cooperate to ensure the production and dissemination of coherent and comparable Statistical information to monitor all relevant economic and trade aspects of the EEA. To this end, harmonised data and common programmes will be supported, where appropriate.

• Encourage friendly co-operation outside the 4 Freedoms. This covers a range of appropriate activities such as: research & technological development, information services, the environment, education and training, consumer protection, small and medium-sized enterprises, tourism, the audiovisual sector and civil protection.

• Encourage other co-operation including EU framework programmes, projects, co-ordination of activities, exchange of information, parallel legislation of similar content, and coordination with third parties / international organisations.

• Where the UK chooses to participate in EU framework programmes, it shall have access to all parts of the programme, shall have a sufficient status on those committees assisting the EU, and have its financial contributions recognised. At the project level, institutions, undertakings, organisations and nationals of the UK will have the same rights and obligations in an EU programme as their equivalents in other EU member states, as with exchanges, and also the same rights as regards to the dissemination of results, and information. Financial contributions shall be made according to commitment appropriations and payment appropriations entered each year into the appropriate budget line in the EU Budget, and agreed in the EU-UK Joint Committee.

• Establish a new EU-UK Joint Committee, in the manner of the EEA Joint Committee, to ensure the effective implementation and operation of the EEA Lite Agreement. It shall carry out exchanges of views and information, consultations and take decisions on cases provided for in this Agreement. The EU-UK JPC shall meet monthly; have a President alternating between the UK and a representative of the EU, such as an MEP or a Commissioner. It will set its own rules of procedure and may establish any subcommittee or working group to assist its tasks. The EU-UK Joint Committee will issue an annual report on the functioning and development of this Agreement.

• Establish a new EU-UK Joint Parliamentary Committee, composed of equal numbers of EU MEPs and UK MPs and Lords, and vary where it holds sessions between the EU and the UK. Its aim shall be to contribute to a better understanding between the EU and the UK, express its opinions in the form of reports and resolutions, and examine the annual report of the EU-UK Joint Committee. It may hear presentations by the President of the EEA Council and EFTA representatives as appropriate. It shall determine its own rules of procedure.

• EEA Lite will not formalise co-operation between economic and social partners but handle this under the EU-UK Joint Parliamentary Committee business.

• Ensure continued influence over EU legislation that is of ongoing relevance to the UK, such as single market legislation affecting the 8% of the UK economy trading with the UK of consequence to UK exporters of goods and services. As with EEA states, who sit on 500 comitology committees and expert groups and who have 1,500 organisations, public bodies and entities participating now in EU programmes (such as 15,000 students who have studied through Erasmus), the EU Commission will be duty bound to seek advice from UK experts in as wide a participation as possible, and on the same basis as EU member states experts, and transmit this to the EU Council as necessary.

As soon as new legislation is drawn up in a field governed by this Agreement, it must informally seek advice from experts from the UK in the same way as it seeks advice from experts in the EU member states on the elaboration of its proposals. When transmitting its proposal to the EU's Council of Ministers, the EU Commission shall transmit copies to the UK. The legislation will then be examined by an exchange of views at the EU-UK Joint Committee. At the request of either Contracting Party, the legislation shall be further discussed at significant moments in what is described as a 'continuous information and consultation process'. The British opt out on the mass of EU legislation within the UK representing 92% of the economy means Westminster regains control over most laws, and claims of a lack of influence over EU laws in the EEA Regular Agreement ('faxed democracy' claims) will not apply. British organisations, public bodies and entities will also continue to participate in a number of EU programmes, as now.

• Confirm that the requirement for homogeneity on the UK side only applies to UK exporters of goods and services to the EU. As stated, the UK intends to regain control of its own core UK single market – 80% that is trade within the UK, and 12% being trade outside the EU. As a result, the UK would establish a new UK Trade Court, similar to the EFTA Court, to rule on any trade, competition, trade mark or similar disputes under this agreement. The Court may take into account judgements of the European Court of Justice (ECJ), the EU's General Court and the EFTA Court by means of informed opinion, but would not be bound by the decisions of those Courts.
There shall be an ultimate appeal to the UK Supreme Court, building on the UK's fine international tradition of an independent judiciary. This is similar to proposed new arrangements in Switzerland.

• Establish a new, independent UK Surveillance Authority, similar to the EFTA Surveillance Authority and the proposed new Swiss Surveillance Authority (in Swiss Confederation proposals of 20th March 2012) to oversee the implementation of the EEA Lite Agreement in the UK in a non-partisan manner and to provide a suitable surveillance procedure.
The UK Trade Court would be competent in particular for: (a) actions concerning the surveillance procedure regarding the UK (b) actions concerning decisions in the field of competition taken by the UK Surveillance Authority and (c) the settlement of disputes between two or more EFTA States. The UK Surveillance Authority will cooperate and both monitor aspects of this agreement. A pecuniary obligation on persons shall be enforceable if a decision reached by the UK Surveillance Authority and EU Commission, and be enforced using rules of civil procedure in relevant state.

• Regarding settlement of disputes, allow the EU or the UK to bring a matter under dispute before the EU-UK Joint Committee, which may settle the dispute using all information necessary for an in depth examination of the situation. An appeal may be made to the UK Trade Court or UK Supreme Court, as required, for a resolution of any impasse within 3 months after it has been brought before the EU-UK Joint Committee and has not been resolved - but not to the ECJ as with the EEA Regular Agreement.

• Make unilateral Safeguard and other measures available, if necessary. If serious economic, societal or environmental difficulties of a sectoral or regional nature are

liable to persist, appropriate safeguard measures can be taken, but the EU-UK Joint Committee must be notified, and immediate consultations held. These measures would be subject to a three monthly review. Proportionate rebalancing measures that are strictly necessary are allowed, and that least disturbs the functioning of the agreement.

• On the Financial Mechanism side, confirm that the UK would in principle seek to continue to provide support for the 'reduction of economic and social disparities' within the EEA area but through a non-EU mechanism directly under UK control. Similar to the Norway Grants and EEA Grants body entitled the EFTA Financial Mechanism office, the UK would establish a new UK Grants body, the UK Financial Mechanism office, to work closely with the EFTA Financial Mechanism office, based in the UK which would dispense UK grants to worthy causes directly and not be paid through a wasteful and fraudulent EU system, one which the Norwegians used to use but stopped doing so for this reason. The value of these contributions would be negotiated in a separate agreement with the EU, just as Norway and the EEA negotiate such voluntary contributions. They would not be express terms of the EEA Lite Agreement.

• Allow the extension of relations between the parties, or their reduction, as desired by the parties. To extend or to reduce relations, a reasoned request to the other Contracting Party/Parties would be made and be submitted to the EU-UK Joint Committee for consideration.

• Allow Contracting parties to take any measures which it considers necessary to prevent the disclosure of information contrary to its essential security interests, or for products indispensable for defence purposes, providing they do not compromise competition, or if essential to its own security in the event of serious internal disturbances or in times of war.

• Include all the territories of the European Union, including Croatia as a recent accession nation, and include on the UK side the territories of the United Kingdom of Great Britain and Northern Ireland. It may also include Crown dependencies such as the Channel Islands, if these dependencies opt to join the EEA Lite Agreement, as they are not members of the EU and are semi-independent within the UK.

• Specify a minimum 12 month notice of withdrawal from the Agreement. It shall also state that immediately after such an intended withdrawal, the other Contracting Parties shall convene a diplomatic conference to envisage the necessary modifications to bring to the Agreement.

• Allow for the EEA Lite Agreement model to be extended to other parties if they apply to join the Agreement, and are a European nation outside of the EU, including any EEA member - such as the Swiss Confederation - who wishes to apply, or non-EU and non-EEA European nations or indeed existing EU member states who also wish to leave the EU under Article 50 of the Lisbon Treaty, as the UK will have done. It may address its application via the EU and the EFTA Council.

• Give an anticipated date for signing of this EEA Lite Agreement (EEA Agreement (UK Variation)) as July 2018, post a UK In/out Referendum to be held by the end of 2017, with a proposed implementation date of 1st January 2019.

The EU and Defence Procurement

By Ian Bond

Submitted as evidence by the Centre for European Reform for the review of the balance of competences between the United Kingdom and the European Union (free movement of services)

Against a background of falling European defence budgets, the European Commission has sought to increase the efficiency of the European defence market by reducing barriers to intra-EU defence trade and by encouraging competition. In principle the UK supports open competition in the defence sphere, but it has been reluctant to accept that the Commission should have a greater role in policing a single market in defence and promoting cooperative procurement programmes.

The advantages and disadvantages of EU action in defence procurement

The defence budgets of EU member-states have fallen since the start of the economic crisis in 2008 from around €200 million to around €170 million. At the same time, the cost of defence equipment has continued to rise. Defence spending in Europe, though still significant, delivers less than it should because of inefficiencies. Defence companies are often monopolies or oligopolies at the national level, but fragmented and unable to exploit economies of scale at the European level.

Member-states have resisted consolidation and the creation of an effective single market in defence for a variety of reasons. First, despite the fact that most EU member-states are also NATO allies, there is a lack of trust between them: nations continue to procure nationally because they are concerned about security of supply in a crisis. The UK is typical in this: the MOD stated in evidence to the House of Commons Select Committee on Defence in May 2012 that "We must be able to operate, maintain and refresh certain capabilities effectively, without being dependent on others". In some cases this may be necessary, but in most cases, as the government has recognised in its national security strategy of 2010, if Britain is involved in military operations it will be working with allies and partners and relying more on "sharing of military capabilities, technologies and partners". When resources are constrained, it would make sense for the UK to pay more attention to value for money when procuring defence items from allies and partners, and to worry less about theoretical risks to security of supply. In the late Cold War, Czechoslovakia supplied some NATO members with explosives for use in ammunition, despite the fact that they were notionally "the enemy"; so the UK should be able to rely on other EU member-states – some of which have been its allies since 1949.

Second, governments are often keen to protect jobs in their national defence industries, both to preserve skills and to avoid increasing unemployment in areas where other heavy industry, for example shipbuilding, may already have closed. As

the European Commission has noted, defence-related industries largely operate outside the single market, and more than 80 per cent of investment in defence equipment is spent nationally.

On security of supply, EU action could help to reassure the UK and others that foreign suppliers will continue to deliver defence goods and services, even in a crisis. The European Commission has started a consultation process with a view to getting a political commitment from member-states to assure the supply of defence goods, materials or services within the EU.

On protectionism, national governments are very unlikely to change their policies unilaterally. The European Commission can therefore play a useful role in ensuring that in defence as in other areas of the Single Market there is a level playing field. The MOD stated in its response to the House of Commons Defence Committee's Seventh Report of 2012-2013 that it supported efforts to open up the defence market to more competition, including through proper implementation of the Defence and Security Procurement Directive (Directive 2009/81/EC), and expected that this would in time eliminate economically-motivated 'buy national' policies in the defence market.

The assessment of costs and benefits from EU rules in the defence industrial sector

National rules implementing the defence procurement directive and a companion directive, 2009/43/EC (which aims to simplify transfers of defence goods items between member states through a system of general licences), were due to be in force by August 2011, but most member-states missed this deadline. The Commission started legal proceedings against four governments that were more than a year late; its July 2013 communication indicates that all member-states have now transposed the two directives into national law. But it is still too early to say exactly how all member-states are carrying out their obligations.

It is also too early, therefore, to say what effect EU rules are having on British businesses. In principle, however, they should be helpful. The UK is one of the six EU member-states with a large-scale defence industry (the others are France, Germany, Italy, Spain and Sweden). The UK defence sector is largely in the private sector and is internationally competitive. As such, it should be well-placed to compete also in European markets, provided that everyone is playing by the same rules. It will be the responsibility of the Commission to police that.

The Commission's efforts to support small and medium enterprises in the defence sector should also help British businesses, by giving them better access to EU-wide markets.

At the same time, a more open and competitive European defence market will create losers as well as winners. British defence firms may also lose jobs as a result of

foreign competition, even if the end result, ie better value for money in the defence budget, is positive for the UK as a whole. The Commission has indicated that the European Social Fund and European Structural and Investment Funds could be used to retrain workers and to support regions hit by the closure of defence manufacturers (though it has not suggested how much money should be available). Provided that such aid is fairly distributed, this would help governments, including the British government, to offset the short-term costs of rationalising defence production.

The obstacles to the creation of a single market in defence goods and services

The European Council in December welcomed the Commission's communication on the defence and security sector, and supported full implementation of the two 2009 directives. But the level of enthusiasm for greater EU engagement in defence market issues varies among member-states. The UK is at the most sceptical end of the spectrum, despite its interest both in increased European defence capabilities and increased value for money in its own procurement.

The key obstacles to the creation of a single market are likely to remain: lack of mutual trust among partners; and the tendency of governments to see defence industries in part as job-creation or retention schemes, not just instruments of national security policy.

Further complications may arise from the importance of the US in the European defence market. The scale and sophistication of the US defence sector creates challenges for Europe, and there are differing views on how best to respond. The UK's leading defence firm, BAE, reportedly sells more to the US than to the UK. It also makes use of many US components and technologies, and in most cases seems able to work within the constraints US legislation imposes on their re-export. Other European companies (and countries) would rather avoid using US items and create European alternatives; this could make it easier for them to export goods to destinations (for example in the Middle East) which the US might see as sensitive.

Future opportunities and challenges for the EU in the defence industrial sector

The biggest challenge is the continued reluctance of EU member-states to draw the right policy consequences from continued pressure on national defence budgets, and increase European defence industry integration.

If that can be overcome, there are a number of areas in which the EU (including the European Defence Agency) could make a useful contribution:

- Harmonising the system for regulating domestic and foreign investments in defence companies, to make consolidation easier while still protecting security interests.

- Funding research into military capabilities. This does not mean the EU owning its own fleet of drones; but it should mean that when it is difficult for a single nation to fund research, or when different member-states are researching the same area, the EU can put together integrated research projects.
- Exploring the scope for a 'Defence TTIP'. Defence has not so far featured in the negotiations on the Transatlantic Trade and Investment Partnership. Negotiating an agreement would be formidably difficult: this is an area in which the US is both highly protective of its own market and highly prescriptive about re-exports of US systems or components to third countries. But a more open transatlantic defence market could be transformative for both sides, creating new economies of scale and new opportunities for European defence exports.

Additional information

Further CER views on the European defence market can be found in:

'The trials and tribulations of European defence cooperation', a policy brief of July 2013 by Clara Marina O'Donnell

'CSDP between internal constraints and external challenges' (EUISS, October 2013), which contains a chapter by Clara Marina O'Donnell on the state of Europe's defence industry

'Not flashy but effective: closer EU cooperation in defence investments', an insight of December 2013 by Clara Marina O'Donnell

'Fail to plan, plan to fail: European security and defence', an insight of November 2013 by Ian Bond

Review of balance of competence between the UK and EU: Single market free movement of services

A response from the Commercial Broadcasters Association

January 2014

CoBA

A VOICE FOR COMMERCIAL BROADCASTERS IN THE UK

Introduction

1. COBA is the UK industry body for digital, cable and satellite broadcasters. Its members include major non-public service broadcasters and smaller niche channels.

2. The digital, cable and satellite sector is one of the fastest growing parts of the UK TV industry, doubling employment over the last decade[1] and growing investment in UK production by nearly 30% in the last three years.[2] COBA members are worth £4 billion per annum to the UK economy (GVA) and invest more than £600m per year in UK TV content[3] - representing 18% of all first-run UK commissions.[4]

3. Our members are A+E Networks, Bloomberg, BSkyB, Chinese Channel, Discovery Networks, Fox International Channels, NBCUniversal, QVC, Sony Pictures Television, The Walt Disney Company, Turner Broadcasting System, and Viacom International Media Networks.

[1] Building a Global TV Hub: Multichannel broadcasters and the UK's global competitiveness, Communications Chambers for COBA, November 2013
[2] COBA 2012 Economic Impact Report, Oliver & Ohlbaum Associates for COBA, September 2012
[3] Ibid
[4] Building a Global TV Hub: Multichannel broadcasters and the UK's global competitiveness, Communications Chambers for COBA, November 2013

The importance of the Single Market to the UK

1.1 The UK is arguably Europe's leading broadcasting hub. According to Ofcom's recent International Communications Market Report, the UK has the largest broadcasting sector in Europe, with a turnover of £11.7 billion.[5]

1.2 This is supported by an independent report for COBA, Building a Global TV Hub, which found that a dynamic, increasingly mixed ecology of broadcasters is fuelling growth. The report, by Communications Chambers, noted that a driver of recent growth has been the increasing importance of the UK multichannel sector, now a £5 billion industry, larger in scale than either the BBC or the commercial public service broadcasters. The sector has doubled employment over the last decade.[6]

1.3 This scale and international reach provides the critical mass the UK needs to compete on the global stage, as well as access to increasingly important financing from overseas markets.

1.4 The AVMS Directive has helped underpin this growth. Under the Directive, a channel licensed in one EU Member State may broadcast into another providing it meets standards in its home country (this is known as the "Country of Origin" principle).[7] As a result, many COBA members under UK jurisdiction, as well as broadcasting in the UK, obtain non-domestic licences through the UK regulator Ofcom to broadcast in other EU markets. This helps promote operational efficiency, as well as simplifying regulatory compliance for industry.

1.5 This has been a key factor in enabling COBA members under UK jurisdiction to base their European operations in the UK, which has resulted in a significant economic benefit to the UK. COBA members are 2.5 times as likely to base their non UK services in the UK than in other EU member states. They operate 127 non UK channels from the UK, compared to 54 channels based in other EU markets.[8]

[5] International Communications Market Report, Ofcom, 2013, page 13
[6] Building a Global TV Hub: Multichannel broadcasters and the UK's global competitiveness, Communications Chambers for COBA, November 2013
[7] Directive 2010/13/EU of the European Parliament and of the Council (Audiovisual Media Services Directive), Article 3 (1)
[8] COBA 2012 Economic Impact Report, Oliver & Ohlbaum Associates for COBA, September 2012. We anticipate that the figure for non UK channels licensed through Ofcom is now higher still since the quoted number refers only to COBA members at the time.

1.6 We believe this demonstrates the crucial role of the Country of Origin principle in underpinning the UK as a European broadcasting hub, with the resulting benefit to the UK economy.

Future challenges

2.1 We are concerned about two potential threats that could undermine the UK's role as a European broadcasting hub. Firstly, any move to weaken or abolish the Country of Origin principle would seriously undermine the ability of broadcasters under UK jurisdiction to license and base their non domestic services in the UK, with the ensuing damage to the UK's status as a broadcasting hub.

2.2 Secondly, in the context of the EU's current review of rules around copyright, we would like to stress the need to enable rights owners to contract to exploit their IP on a flexible basis. Revenues accrued from IP exploitation are vital to generating the investment to create the content in the first place. Actively intervening in the market to require an obligatory, prescriptive approach to rights exploitation would limit the range of ways in which broadcasters can attract investment for content creation. A flexible approach also enables industry to develop different distribution models, encouraging potential new sources of funding and delivering choice for audiences.

CBI Response to the Balance of Competences Review on the Single Market: Free Movement of Services

February 2014

For British business, large and small, the response to questions about the UK's future in the EU has been unequivocal: we should remain in a reformed European Union. Membership of the EU's Single Market remains fundamental to our global economic future. The CBI has comprehensively and objectively analysed the advantages and disadvantages of EU membership and concluded that the benefits vastly outweigh the costs.

However, the EU is far from perfect and with wider changes in the global economy, the EU must seize the opportunity to reform in order to keep pace in an increasingly globalised world. Business wants an EU that is fully focused on jobs and growth. This means being more open and outward looking to facilitate new trade opportunities, updating the Single Market for the 21st century; and changing the EU's regulatory approach to drive European competitiveness. It also means ensuring the EU works for all Member States – whether they are in the Eurozone or not – and striking the right balance between what is done at EU-level and by individual Member States.

The CBI therefore welcomes the opportunity to provide evidence to the Government's review of the Balance of Competences between the United Kingdom and the European Union. Our response focuses on the call for evidence questions in the review of the Single Market: Free Movement of Services.

About the CBI

The Confederation of British Industry (CBI) is the UK's leading business organisation, speaking for some 240,000 businesses that together employ around a third of the private sector workforce.

The CBI helps create and sustain the conditions in which businesses can compete and prosper for the benefit of all. We are the premier lobbying organisation for UK business on national and international issues. We work with the UK government, international legislators and policymakers to help businesses compete effectively.

Executive Summary:

Access to the EU's Single Market in goods and services has been a major benefit for the UK economy, giving UK businesses access to the biggest Single Market in the world, allowing them to exploit the economies of scale that can drive wider competitiveness, and bringing them into complex pan-European supply chains that bring indirect benefit from sales and exports from European firms right across the EU and beyond. For CBI members, access to and participation in European markets has been the largest single benefit of EU membership for the UK, with 76% of firms of all sizes and sectors stating that the creation of the common market specifically had a positive impact on their business.

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The two big areas for future opportunity are in developing a Single Market for services – a major economic strength of the UK – and in updating the Single Market for the digital age.

- Whereas intra-EU trade in goods amounts to a third of the size of the EU's manufacturing sector, the corresponding figure for services is around 3%. For the UK, as a global leader in services exports, this undeveloped market has significant potential.
- Digitalisation is not just revolutionising the way that firms do business, it is also a key lever which can be used to unlock broader economic benefits: a larger 'online' consumer base, job creation and retention, together with support for high-growth industries. Progress towards a completed Single Market – including on digital and services – could add up to 14% to EU GDP after ten years with a 7.1% increase in UK GDP, according to a BIS study. Although the total elimination of all barriers is not feasible – cultural and language barriers will always remain, as an extreme example – these figures nonetheless point to the huge gains potentially available. Overall, access to the EU market in goods and services has been a major benefit for the UK economy, expanding the potential market, allowing UK firms to become part of complex supply chains.[1]

As a result of the free movement of services, companies in the European Union are guaranteed the freedom to establish themselves in another Member State and provide services. The guiding principles of this fundamental freedom have been clarified through ECJ cases over the years.

Despite progress in certain service sectors, the overall Internal Market for services has not reached maximum potential. In January 2004, the Commission presented the Services Directive, which aimed to eliminate obstacles to trade in services, was adopted in 2006 and the deadline for transposition was before the end of 2009.

The Services Directive was adopted under the principle of mutual recognition, but its limitations are clear given that the European services market remains fragmented. Many of the challenges are related to the lack of proper implementation of the Services Directive, burdensome national rules and procedures, difficulties with the recognition of national professional qualifications and stringent rules for regulated professions.

Company Law

The CBI fully endorses the objective of promoting effective corporate governance in EU companies and effective stewardship by shareholders as the company's owners, and believes that principles-based Codes are the best way to achieve this. Effective corporate governance requires balanced boards made up of people with the right skills operating in a transparent and accountable framework. Good practice should be shared across businesses but laying down inflexible rules can result in a tick-box approach, forcing businesses to adopt frameworks that do not work for them and does nothing to improve outcomes. The CBI works with its members to promote good practice and support the development of governance codes in the UK.

It is of crucial importance that the differing systems of company law in Member States and differing shareholder profiles can be properly reflected in relevant national corporate governance codes. The UK has had a Corporate Governance Code since 1991, and corporate governance codes now exist in every EU Member State.

The CBI does not support corporate governance measures at the EU level for companies that are not listed. Unlisted companies tend not to have large numbers of shareholders whose interests require protecting beyond the requirements of company law and other legislation, unlike listed companies. Unlisted companies can model their governance practices on the Code that applies to listed companies in their jurisdiction, as they judge appropriate, but this does not require or necessitate EU involvement. Any measures affecting the governance of subsidiary companies of EU listed

[1] http://www.cbi.org.uk/media/2451423/our_global_future.pdf

companies would not be appropriate, since the governance code and other measures applying to its parent will be sufficient.

The CBI encourages increased diversity through company reporting against internally set targets on a comply-or-explain basis. However, the CBI is against quota regulation which places tokenism over talent and does not address issues in the talent pipeline.

On remuneration, the CBI supports steps to improve communication between shareholders and companies. The Government has correctly identified that this is best achieved through increased transparency and shareholder empowerment. It is through these means that corporate governance will operate most effectively. Link between pay and performance must be clear. There are things that can be done: improving transparency on the criteria used to set rewards; executive pay considered as part of organisation-wide pay strategy; and withholding performance-related pay in cases of poor performance. Corporate governance is the right framework to address executive reward, but any reforms must respect the roles of shareholders and Boards. We believe the new UK reporting regulations together with binding and advisory votes are appropriate. However, this has increasingly been politicised at the EU level with remuneration policy inserted into a number of financial services related dossiers.

Major regulatory changes are being made to the reporting landscape at a national, EU and international level. The financial crisis and recent scrutiny of companies' tax and remuneration policies has damaged the reputation and credibility of business. As a result, there has been a further increase in public scrutiny and greater transparency is being demanded by various interest groups. The shareholder-focused approach to reporting is coming into question as a result.

It is important that investors are provided with all the information they need to make well informed decisions, but increasing the volume of reporting is not the right answer. Increasingly, the policy debate reduces to one about what is and is not useful, material or relevant, on an issue-by-issue basis – particularly in light of the country-by-country reporting debate.

The UK Narrative Reporting Regulations have attempted to improve the format of reports and is seen as helpful by business as it allows for a shorter annual report. However, it is in the interest of all parties – preparers, users of information, policy-makers and regulators – that reporting requirements are not duplicative. Given that national and international frameworks are constantly evolving, changes to the reporting landscape should take a flexible and dynamic approach and also recognise existing frameworks. Coherence in reporting regulation is necessary in order to avoid confusion, double counting, or substantial compliance burdens. For example, the EU requirements to disclose non-financial and diversity information should not apply to a different audience than for the UK narrative reporting requirements.

Any additional regulatory burden has to be imposed on the basis of international agreements so that it does not affect the competitiveness of British businesses and a level playing field is guaranteed. In light of the fact that many European companies are still in a state of recovery, it is essential that no further competitive disadvantage for UK or European companies in global markets is created.

Public Procurement

The review seeks views on the effect of EU-level procurement legislation and the desirability or otherwise of further harmonisation. The CBI has welcomed many aspects of the revised EU Procurement Directive as positive steps in making more transparent and simple the existing regulations government public sector procurement. The CBI expects that the modernisation process will have a positive impact on the performance of public procurement in the UK, and will provide a positive framework within which the UK's Government's own programme of commercial and procurement reforms can be completed. The test for any balance of competences is whether it helps boost competitive and transparent public sector markets in the UK and across the EU and creates

opportunities for UK firms to win new business outside the UK. At the moment, the EU-level procurement legislation has a positive impact in this regard.

As to the desirability of further harmonisation, it is premature at this stage, prior to the transposition of the new Directive, to take a determined view. It will only be once the Directive is transposed by Members States and is operating, and businesses are able to judge the commercial impact of the changes, that the need for the existing legislation to go further will become clear. Given the complexity of public procurement processes, we would in principle be cautious about any major extension of competences and drift of oversight to the centre, as there is a risk of the oversight of procurement processes becoming less effective.

Digital Services

In the global race for capital and customers, connectivity is key. Building the right connections with the right investors and at the right time can transform a business, enabling that firm to expand and compete in the global marketplace. For government, this means working to ensure that these connections can take place, creating an environment in which the right infrastructure can be built, in the right place, to the right specification. Much emphasis has been placed on the importance of direct transport links to boosting trade. However, there is a more direct, instant connection that is revolutionising the way we do business and access markets, which must be fully recognised in the debate around infrastructure: the UK's expanding digital footprint.[2] In the CBI's 'Let's get Digital' report, published in June 2013, the main recommendations were as follows:

1. Government must articulate a vision and ambition for UK digital infrastructure that permeates Whitehall departments and boosts industry innovation.
2. To translate this vision into reality, government must work with industry to develop a clear delivery strategy that provides investment certainty beyond this Parliament and which has cross-party support.
3. The regulatory framework for digital should be updated to encourage investment and cross-industry collaboration.
4. Government and industry must set out a coherent plan to boost business uptake of digital technology – and the CBI will use its networks across sector and region to raise awareness of the commercial opportunities of doing more online.

The UK's historic strength in manufacturing and recent strength in services have attracted a variety of global technological players that employs about 1.3 million people in the UK. Global revenues in hi-tech services and applications are expected to grow by 18% and 22% annually respectively, whereas manufacturing revenues are expected to decline by 3% per annum throughout the next decade. For the UK, with its strength in services, this transformation offers potentially huge opportunities.[3]

While the agreement to reduce the EU's overall budget that was struck earlier this year in many ways represented a positive development, the impact on the Technology, Media and Telecoms (TMT) sector was less positive. The budget for the Connecting Europe Facility was cut from €9.2 billion to €1 billion. This represented a setback for the UK as a leader in e-commerce and content development.[4] Nonetheless, the major part of this reduced funding will be used to facilitate the mobility of citizens and businesses by providing seamless cross-border public services such as eProcurement, eHealth, or Open Data.[5]

Conclusion

[2] http://www.cbi.org.uk/media/2143865/lets_get_digital.pdf
[3] http://www.cbi.org.uk/media/2451423/our_global_future.pdf
[4] http://www.cbi.org.uk/media/2451423/our_global_future.pdf
[5] http://ec.europa.eu/digital-agenda/en/connecting-europe-facility

Further work is needed to improve the Internal Market for services, which accounts for the largest part of the EU economy representing nearly 70% of EU GDP and two thirds of total employment in Europe. Better implementation and enforcement of the Services Directive, as well as modernising and simplifying administrative procedures for service companies would aid the services sector to tap into the benefits of the Internal Market.

Thank you for the opportunity to respond HMG review of the Balance of Competences Semester 3 Call for Evidence Single Market: Free Movement of Services.

The Engineering Council area of interest lies in the mutual recognition of professional qualifications. The Engineering Council is the UK Competent Authority for the protected professional titles of Chartered Engineer (CEng), Incorporated Engineer (IEng), Engineering Technician (EngTech) and Information and Communications Technology Technician (ICTTech). The Engineering Council brings together 36 professional engineering associations that are licensed to assess engineering professionals for award of these professional titles.

Engineering is a highly mobile profession and many registrants work outside the UK, in EU member states or further afield, on a temporary or establishment basis. The Engineering Council therefore works with many partners to promote the mobility of engineers through the development of shared standards and mechanisms for recognition of professional titles. Our partners include the European Federation of National Associations of Engineers (FEANI) and the European Network for the Accreditation of Engineering Education (ENAEE).

The award of the Engineering Council professional titles is dependent on a competency-based assessment of formal, informal and non-formal education, professional training and practice, and validated competence at an appropriate level. The competence standards are set out in the UK Standard for Engineering Competence (UK-SPEC) and the ICTTech Standard. These standards have been developed and are maintained by the Engineering Council in collaboration with its member associations and other key stakeholders in the sector. The Engineering Council has very limited direct engagement with individual registrants as assessment is carried out by professional engineering institutions under licence. Our only first-hand knowledge of registrants experience of service provision within the EU, relates to applications for recognition of professional qualifications where we have been asked to support registrants who facing barriers to recognition. We therefore limit our comments to point 30 on the functioning of Directive 2005/36: recognition of professional qualifications, and associated questions.

The small number of complaints about recognition that we receive annually suggests that the system works reasonably well in most cases. The UK operates a system of voluntary regulation of the engineering profession through the award of protected titles. It is possible for inbound EU nationals to access employment in the vast majority of engineering activities without becoming registered and we are not aware of many inbound engineers experiencing recognition problems. The UK interpretation of the Directive has sometimes led to complaints that it is easier for a non-UK engineer to access the UK professional titles, where elements of the assessment (specifically the competence-based professional review interview) are required to be waived, even though they are not replicated in the home system.

We do find that in certain member states, access to the profession is much more tightly controlled, through legislation and reservation of activities often to those with specific academic qualifications. We also note that in many member states, the professional qualification is issued as a consequence of the award of an academic qualification and it seems that the concept of a professional qualification, requiring professional training and practical application, is not always understood or supported. In such states, UK professionals who have attained their qualification through alternative routes, such as informal and non-formal learning can experience difficulties in attaining appropriate recognition for their qualifications. This may affect them to a greater or lesser extent, depending on the extent to which engineering activities are reserved in the member state concerned.

The provision of national contact points, and the SOLVIT service, have had a positive effect in obtaining information and resolving recognition problems in many cases. The database of Regulated Professions has the potential to be a useful tool, although it does not appear to be complete, and the choice of languages means that a search can sometimes produce incomplete results. Nonetheless, it is unlikely that we would have access to such a comprehensive tool without it being driven by the Commission. However, not all member states provide complete data, and it does not provide a complete picture of barriers to service provision. Some national contact points are unresponsive and we are often able to get better information, more quickly, through our own networks. We have recently had a case where we could not find a profession listed in the database and, despite repeated attempts, we received no response from the NCP to clarify national requirements and how to tackle barriers that had been raised. Our in-country network contact later advised that the barrier was likely to have been political rather than legal. We are very pleased that the standard of service provided by the UK NCP appears to be exemplary and would like to see more effort to ensure others are brought up to the same level.

It is also the case that in many member states, the Competent Authority is a government department that does not necessarily have expert knowledge of the engineering profession. This can lead to an overly pedantic approach, for example looking for listing of specific subjects as discrete courses in degree transcripts when the subject may be embedded across the academic programme; reliance on translated text delivering an exact word match; insistence on academic study of a specific duration (not more, not less) whilst failing to take account of the professional training and experience that is the essence of the directive. We are also aware of cases where the Competent Authority has made a positive recognition decision, but the body operating the professional register has refused to implement this. Some cases have resulted in legal action but even where the Member State's courts have upheld positive recognition, our registrant has still been denied admission to the body/register and therefore access to reserved activities.

The recent revisions to the Directive seem to have placed greater emphasis on technical solutions than dealing with those member states that are non-compliant. Thus we may face the costs of implementing a solution that imposes additional administrative burden without a correspondingly improved outcome. Conversely, for non-regulating member states, the provision for individuals with two-years practice in lieu of a professional qualification to be eligible for recognition has been reduced to a requirement for only one year of practice. The response given to a request for clarification for the rationale for this was that it was necessary to show some progress in removing barriers. This seems an over-simplistic 'change for the sake of change' and is hard to marry with the UK principle of professional registration as a mechanism to protect the public. Nonetheless, some of the developments, such as the introduction of the concept of Common Training Frameworks, introduce interesting possibilities.

Future challenges and opportunities may arise from European Free Trade Agreements. The collective action of the EU may open up avenues to address barriers to mobility in other countries. The challenge will come in trying to get agreement amongst the 28 member states on the basis for such recognition.

Federation of Small Businesses
The UK's Leading Business Organisation

FSB response to the Government's Balance of Competences Review: consultation on the Free Movement of Services

January 2014

Introduction

Small businesses are the lifeblood of the European economy, providing more than two thirds of private sector employment. SMEs make up 99 per cent of all businesses in the EU, of which 92 per cent are micro enterprises. The FSB's membership falls firmly into the latter category. The average headcount of an FSB member's business is seven members of staff.[1] Just over one fifth of FSB members export and the European market is their main destination (88 per cent trade within the EEA).[2] Two-thirds of our exporting members export goods, mostly to the EEA, while one third export services.[3]

The internal market offers easy access for first-time exporters with a market of over 500 million customers and over 20 million businesses on their doorstep. The internal market creates legal certainty and attempts to level the playing field through competition rules and harmonised rules. This means that businesses can save considerable cost when selling to EU countries. In theory, 28 sets of domestic regulation are merged into one.

There is an untapped potential in the European single market for services from which small firms can benefit. It is therefore vital to tackle specific challenges and smooth the way for small businesses. For example, if the Services Directive was fully implemented throughout Europe, this could increase GDP by 2.6 per cent.[4]

We support the continuous development of the internal market and the liberalisation of trade, including digital entrepreneurship. However, rules should be developed according to the highest standard of smart regulation. Small and micro-businesses have more difficulty complying with regulation than big businesses and suffer more from the cumulative effect of legislation. Almost a third (31 per cent) of FSB members find regulation and enforcement (EU and UK legislation) a barrier to success.[5] One particular law may not appear so burdensome, but it is the accumulation of burdens that discourages a business from taking on staff or venturing into new markets. Therefore, we believe quality legislation, implemented to the same standard by all the Member States, is essential for the common market in services to thrive and grow.

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[1] FSB (2012) *FSB 'Voice of Small Business' Member Survey*, FSB.
[2] FSB (2013) *Enabling small businesses in the drive for more UK exports*, FSB.
[3] Id.
[4] Webpage: https://www.gov.uk/government/policies/making-the-single-market-more-effective, accessed 14 January 2014.
[5] FSB (2012) *FSB 'Voice of Small Business' Member Survey*, FSB.

Questions

1. What do you see as the advantages and disadvantages of EU action on the free movement of services? How might the national interest be served by action being taken in this field at a different level (for example, at the World Trade Organisation level, or at the national level), either in addition to or as an alternative to EU action?

Advantages

The European single market for services helps small businesses trade their services with over 500 million consumers and 20 million businesses in 31 countries forming part of the EU and EEA. Furthermore, it allows small firms to benefit from supply-chain activity from bigger companies that choose the UK as a hub to manufacture and distribute their products, or from European companies which have opened a branch in the UK.

Disadvantages

One of the disadvantages of the European single market for services that some members have told us about, is the increased use of standards in the services sector. While standards help open up the European market by acting as a quality mark, it is also difficult for small businesses to keep up with frequently changing standards. They can restrict the activities of small businesses and increase their costs.

The FSB believes we have to be careful with developing European standards for services. Services are often provided in a local context and European standards would not always be able to take into account every different local situation. Therefore, standards should always be voluntary and not automatically made mandatory through legislation.

Action at other levels

The advantages of the European single market for services outweigh the disadvantages. Britain is taking the lead in pushing the single market in services and this is the best tactic to guarantee access to this market. The services sector provides huge opportunities for small businesses, especially for those who are trading online. Our latest survey shows that the sales of services and digital content online are increasing and may be as important as the online sales of goods in the near future.[6]

[6] FSB (October 2013), *Voice of Small Business Panel Survey*.

Given the degree of market integration, the FSB cannot see how a single market of 31 European countries can be created at anything other than EU level. For example, the World Trade Organisation (WTO) has not been able to establish this level of integration in the global services sector.

The vast majority of our members that export services trade with EU countries.[7] Therefore, it is clearly in our economic interest to support the European single market, including the free movement of goods, services, capital and persons. The UK's national interest is not served by actions at other levels. They won't achieve current levels of market integration and they lack representative bodies with enforcement capabilities. Therefore, a body such as the WTO could not be seen as an addition or as an alternative to the EU for regulating *intra-EU trade* in services.

2. To what extent do you think EU action on the free movement of services helps or hinders UK businesses?

The FSB cannot compare business output with a hypothetical situation where there was no EU involvement, nor a single market. However, the European single market for services that we are part of, helps businesses selling their services throughout the EU. It saves them money and administrative burden as barriers are reduced and rules are increasingly harmonised. Our own figures show that the EEA is export destination number one for nine out of ten of our exporting members.[8] There would have been fewer exporting small firms had more barriers existed and had rules not been harmonised. The European single market for services also creates (fair) competition and should therefore improve quality.

3. To what extent has EU action on the free movement of services brought additional costs and /or benefits to you when trading with countries inside and outside the EU? To what extent has EU action on the free movement of services brought additional costs and /or benefits as a consumer of services?

The FSB has no evidence of additional costs from trading with other EU countries caused by the single European market for services, quite the contrary. For example, if there was no Services Directive, businesses would face huge costs to enter a market that is governed by national rules. Obviously, there are costs from complying with EU regulation. Whether the UK or the EU are source of legislation, the FSB always insists that regulation must be

[7] FSB (June 2013) *Enabling small businesses in the drive for more UK exports*, FSB.
[8] Id.

designed according to smart regulation principles, based on a full economic cost-benefit analysis, in order to limit the administrative and compliance burdens on business, especially small and micro businesses, who find them hardest to bear.

Some businesses suggest that EU rules make them less competitive on the global market. Although this could be true in specific cases, the FSB has no evidence the European single market for services is the cause of additional costs to business when trading with countries outside the EU.

4. How well, or otherwise, have the EU's mechanisms for delivering the free movement of services worked?

The single market for services is functioning less well than the market for goods. This is because services are often linked to local rules and practices, making it more difficult to create a level playing field on EU level. It is therefore vital that Member States fully transpose directives that open up the market for services. The Commission's annual Single Market Score board shows that the current transposition deficit is the lowest since the scoreboard was published.[9] However, any incomplete implementation of legislation will chip away at a true and fair single market for services. The FSB therefore welcomes Commission action against any infringement of single market rules.

5. In your experience do Member States take a consistent approach to implementing and enforcing EU rules, or not?

There are differences in implementation and enforcement between member states. The FSB has no evidence to what extent this is detrimental to the free movement of services. Also, there appear to be suggestions that some countries deliberately choose not to fully implement EU directives in order to protect their own market.

Whether the statements in the paragraph above are true or not, we have anecdotal evidence from our members that it is sometimes easier to buy new licences in the country you want to provide your services in, rather than using your existing UK licences, and have them validated by the authorities via the Internal Market Information system. Also, in our own experience the Single Points of Contact are of varying quality with some being difficult to navigate.

[9] Internal Market and Services (2013), *Internal Market Scoreboard. February 2013*, European Union.

Furthermore, the FSB believes SOLVIT has a vital role in helping member states take a consistent approach to implementing and enforcing EU rules.

6. Do you think the UK's ability to effectively regulate cross-border provision of services would be better, worse, or broadly the same, as the result of more or less EU action?
See answers to questions 1-3.

A situation whereby the UK regulates the cross-border movements of services is all quite hypothetical. The FSB supports the single market and asks policy makers to do all they can to make it easier for small businesses to access the 500 million customers and 20 million businesses it offers.

7. What future challenges/opportunities might we face in the free movement of services and what impact might these have on the national interest? What impact would any future enlargement of the EU have on the free movement of services?
The FSB has no particular evidence or comments to feed in here.

8. Is there a case for more EU action to ensure that assessments for proportionality and necessity are more consistently interpreted? [see paragraphs 22 and 27 for more detail]. Or should the competence to assess these remain with Member States, as is the case now?
The FSB calls on EU policy makers to make sure all legislative proposals are proportionate to the problem and risk and evidence-based. They must follow the principles of subsidiarity and proportionality as enshrined in the European treaties, with national Parliaments exercising their powers appropriately.

9. Should decisions affecting the integrity of the Single Market be taken by all Member States and apply equally to all, or do you believe it is possible to take further liberalising action either unilaterally or with a selection of other Member States, whilst maintaining the integrity of the Single Market?
Decisions affecting the integrity of the Single Market should be taken by all Member States. The UK is in one market with 27 other countries and the level playing field should be maintained at all times. However, it was not possible to reach agreement on the Unitary Patent and all EU countries except Spain and Italy went ahead. Although not good news for

companies who want to file a patent in these countries, there would have been no progress on the unitary patent had the other Member States waited for Spain and Italy, hampering the EU's competiveness in the process. However, a practice such as this should be used with extreme caution.

Rules that are reshaping the Eurozone are another example of decisions that may affect the integrity of the Single Market. The UK must ensure that as governance structures for the Eurozone change, there is no impact on the functioning of the single market.

10. What do you see as the advantages and disadvantages of EU action on the mutual recognition of professional qualifications (MRPQ)? To what extent do you believe that the cost of existing or future European rules in this area is proportionate to the benefits?
The FSB has no particular evidence or comments to feed in here.

11. What do you see as the advantages and disadvantages of EU action on company law? To what extent do you believe that the cost of existing or future European rules in this area is proportionate to the benefits?
When designing company law (EU) policymakers should recognize the needs for SMEs and micro-businesses and make it easy for firms to start up.

12. What do you see as the advantages and disadvantages of EU action on public procurement? To what extent do you believe that the cost of European rules in this area is proportionate to the benefits? What is your view of the effect on the defence sector?
The FSB is keen to increase the number of small businesses that win central and local government contracts. However, the current rules can make it difficult for small firms to bid, and easily exclude them. The new rules on public procurement go into the right direction when it comes to improving access for small firms to government contracts. However, the FSB regrets that the obligation for authorities to justify the reasons why bids are not divided into lots, hasn't made it into the new rules. The FSB would also like to see a 'social clause' in contracts, obliging the winning firm to pass down favourable payment terms to any business in the supply-chain.

13. Are there any general points you wish to make which are not captured above?

The Government could explain better what the single market for services means for small businesses. If businesses don't know what opportunities there are out there, they cannot take part in the benefits of the single market. A European Commission survey in 2011 found that 61 per cent of British respondents didn't know what the single market was.[10]

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[10] Internal Market and Services (2012) *Single Market Governance. United Kingdom*. European Union.

Call for Evidence on the Government's Review of the Balance of Competences between the United Kingdom and the European Union

Single Market: Free Movement of Services

Question 10. What do you see as the advantages and disadvantages of EU action on the mutual recognition of professional qualifications (MRPQ)? To what extent do you believe that the cost of existing or future European rules in this area is proportionate to the benefits?

Index

Introduction

The Institution of Civil Engineers (ICE) is a UK-based international organisation with around 84,000 members worldwide ranging from students to professionally qualified civil engineers. It is an educational and qualifying body and has charitable status under UK law. Founded in 1818, the ICE has become recognised worldwide as a qualifying body and as a public voice for the profession and for its excellence as a centre of learning.

ICE is the UK competent authority for the profession of Civil Engineer. Over the last 7 years ICE has received 331 applications for recognition under Directive 2005/36, with 69 in 2013.

ICE is licensed by the Engineering Council to assess civil engineers for the regulated professional titles of Chartered Engineer (CEng), Incorporated Engineer (IEng) and Engineering Technician (EngTech) in conjunction with the award of Membership or Technician Membership of ICE.

Our regulated professional titles are covered by the European Directive 2005/36 in the general system, concerning establishment (provisions for temporary mobility do not apply), which requires ICE to accept applicants and assess their existing professional qualification on a case by case basis against ICE's requirements for registration at the equivalent grade.

In the UK, any engineer is free to obtain employment in their profession without a UK professional qualification, and we are aware of many EU graduates (with or without professional qualification in their home Member State) that come to the UK and obtain work with no problems, and many who do then undertake professional training in the same way alongside UK graduates.

Civil Engineers seeking ICE professional qualification can, and frequently do, apply at any stage in their careers, whereas in most of the EU the national professional qualification is much more closely linked with graduation and completion of academic qualifications, in particular in those Member States where the profession is regulated.

Professional qualification through ICE and the Engineering Council is proof that a member has met a benchmark standard in their individual education, experience and demonstration of professional competences. Not all UK civil engineers who apply for professional qualification will achieve it. Equally, any civil engineer from anywhere in the world is able to have their education, experience and competences assessed by ICE and if they meet the standards they can achieve our professional qualification.

What do you see as the advantages and disadvantages of EU action on the mutual recognition of professional qualifications (MRPQ)?

Advantages

Although there are potential advantages of the European Directive 2005/36 which deals with the issue of the mutual recognition of professional qualifications, there are currently many issues and obstacles with the way that it is being implemented in the EU Member States. The following possible advantages therefore have to be read in the light of the issues/obstacles affecting engineers actually trying to work in other EU Member States (please see Appendix I below for case studies to back up these issues):

1. Clarification of contacts and processes

The civil engineering profession and process of becoming professionally qualified vary widely across the EU. This means that it is difficult for an engineer from the UK to understand how and if they need to apply to work as an engineer and, in some regulated Member States, to obtain the required permission to work/equivalence to their professional qualification from the UK. The creation of the

European Directive 2005/36 should, in theory, make this clearer by providing a contact point and competent authority in each EU country for dealing with engineers from other EU Member States. This is something that would take a lot of time and resource to research, either by the individual themselves or by the ICE on its members' behalf.

Issues/Obstacles: The data in the regulated professions database is not always complete or reliable, due to differences in terminology. The IMI system is not yet fully functioning or very widely used by relevant competent authorities for the civil engineering profession - finding information on what is regulated, who regulates it and what information needs to be supplied can be a problem. ICE (and we are also aware that the European Council of Civil Engineers) therefore spends much time and resource on researching how the process works in other EU Member states on behalf of its members.

2. Highly regulated Member States are required to recognise non-national professionals

The main issues with mobility appear to be with the highly regulated Member States (ie where non-nationals cannot obtain work or, if they do, cannot fulfil many of the related functions of that role without full national registration). The creation of the Directive should also be useful in ensuring that these Member States are required to give due recognition to the the UK's professionally qualified civil engineers to enable them to work in that country at an equivalent level. This is something that the UK could not do alone as, without the Directive and a higher authority to enforce it, there would be no need for the regulated Member States to allow non-national engineers to work in their country.

Issues/Obstacles: Before the Directive, there were only really issues of mobility with the regulated Member States and the Directive has not resolved these, as it has not always been implemented correctly. This means that all the EU Member States have had to use time and resource to implement the Directive but are not necessarily receiving the expected benefits for their own engineers who wish to work in other EU Member States.

The penalties for non-compliance need to be more effective. Currently, the only method of penalising a country appears to be through the use of fines, which take a long time to be levied. It is not obvious that they have the desired effect. ICE has advised people to contact SOLVIT for individual cases.

3. Reduction of delays

The Directive stipulates time frames for granting the same rights of recognition for qualified professionals as those within their own country and so should ensure that EU Member States cannot create unreasonable delays.

Issues/Obstacles: As above, if a Member State has not properly implemented the Directive then engineers still face significant delays in, or are prevented from, obtaining recognition.

Disadvantages

1. Benefit/value does not necessarily outweigh the Effort/costs

As above: Before the Directive, as far as we are aware, there were only really issues of mobility to the regulated Member States and the Directive has not resolved these, as it has not always been implemented correctly. This means that all the EU Member States have had to use time and resource to implement the Directive but are not necessarily receiving the expected benefits. In addition to this, changes that will be required under the modernised Directive are likely to result in more time and resource for the EU Member States in implementing the changes when they have not yet experienced the original intended benefits and there is no guarantee that any changes will be any easier to enforce, whilst to compound matters, the current issues will remain.

1. Equality of access to ICE's professional qualification in the UK

Some Members feel that it is 'easier' to become qualified through ICE's Directive Route to membership. In the UK, we encounter the situation where, for example, a French or Swedish civil engineering graduate who has worked for 2 years in their home Member State can apply to ICE for recognition of their "professional qualification" when they have done nothing more than obtain a degree, whereas a UK civil engineering graduate with a comparable degree will also have to pass an assessment of their initial professional development as well as a peer review interview to demonstrate their competences in order to achieve a professionally qualification in the same profession in the UK.

To what extent do you believe that the cost of existing or future European rules in this area is proportionate to the benefits?

Engineers from outside the UK can practice the profession in the UK without having our professional qualification and our process already takes account of the existing qualification and experience that they possess. The Directive therefore mainly only applies to the heavily regulated Member States, where it appears that it has not always been correctly enforced. It would therefore appear that the cost of implementing existing or future rules would not be proportionate to the benefits for engineers in the UK. Time and resource would better be spent on focusing specifically on addressing the actual barriers to mobility and recognition in those particular Member States where complaints are common and on making the current system work. This is necessary as any future work suggested to date does not address the current issues; these will remain. Future work also carries the additional risk of introducing further challenges/issues

Future challenges or opportunities

The review of the Directive included reference to several issues that could present challenges or opportunities to ICE if they have to be enforced in any existing or future European rules:

1. Partial access - It will be interesting to see what effect this would have for our engineers going to work in other EU Members States. A civil engineer does not have to be registered with ICE in order to practice their profession in the UK, and we cannot grant partial access to our title as it is awarded on the basis of a holistic assessment. ICE's professional qualification is not based on specialism or categories of practice as is often the case in other Member States where partial access may be possible to grant.
2. European Professional Card – An effective and worthwhile European professional card should ideally speed up the recognition process but we will have to see how this would work in practice.
3. Reduced times for processing - The Directive already stipulates deadlines for processing applications, however, if this were to be reduced it could mean that ICE would have to change the way that it processes applications and an increased need for resource.

Country of Origin Principle

As the civil engineering profession and process of becoming professionally qualified vary widely across the EU it would be almost impossible to use the Country of Origin Principle for civil engineers. For example: you need seismic engineering to work in Member States that suffer from earthquakes so an engineer from the UK would always have to do some kind of compensation measure to work in that country. There would have to be so many exclusions and clarifications, and the process to identify what these are would almost be equal to that of creating a Common Platform, so that, in our opinion, it would not be worthwhile.

Appendix I: Two case studies of issues/obstacles experience by ICE Members trying to obtain recognition in a regulated EU Member State

Case Study 1

Coventry uni, 91-96, accredited BEng hons
ICE qualifed 2004
Currently living/working in UK but had applied to an EU Member State.

This applicant applied for recognition in 2005 to the Ministry of Education in an EU Member State. ICE provided information in support for his application. After 10 months he was told that his application was not accepted, but that a panel would study his case to determine compensation measures. This took another four months.

The Competent Authority only assessed his academic qualifications not the subsequent training and experience and the fact that he has obtained CEng MICE.

The panel assessing his case only included one civil engineer. The other nine represented other disciplines.

The panel initially identified shortcomings in the field of Transportation and Hydraulics, and made a comment about earthquake engineering. He felt that his work experience in highway design had been overlooked, and Hydraulics was part of his studies. He understood that earthquake engineering may be a valid point, if this is compulsory in that country.

In August 2006 he was advised that his experience and qualifications were not equivalent to that of an Engineer in their country and offered a compensation measure of supervision for a 3 year period (unclear how this would work as he was self-employed) or to sit an assessment in the native language.

He was advised to study the following 10 subjects in order to be deemed equivalent and reapply:
Steelwork Construction, Transport Design, Anti-seismic Technology, Transport Planning, Highway Construction, Hydraulics – dams, Sea Engineering, Port Engineering
Environment, Soil Mechanics & Foundations.

He also approached SOLVIT and FEANI for help and advice.

ICE acted on this by writing to the British Embassy. Whilst sympathetic, the Embassy acknowledged there was little they could do and that the matter had to be dealt with at European level.

Correspondence between ICE and this candidate continued to end of 2007. His case was not resolved.

Case Study 2

Imperial College 1974, BSc hons
ICE qualifed 1977

This applicant applied to the Ministry of Education in the same EU Member State as in Case Study 1, in September 2006. ICE provided information in support of his application. His case was heard in Feb 2007. Acceptance was recommended in the report, but a member representing the competent authority of the committee objected due to the length of degree and lack of seismic engineering. April 2007 further documentation on work experience was requested and reassessed in May. Voted 5-4 to refer to a special 3-member committee which included the same member representing the competent authority. As part of this process he was asked to attend and asked one question on transportation systems. July 2007 he is advised that he lacks experience in seismic engineering and is offered compensation measure of 12 months practical training in this subject or to sit exams. The committee had not asked him any questions on seismic engineering as they had been absolutely sure he had no knowledge on the subject, however, in his application he had included a letter from the department for seismic engineering from a Technical university in the capital of that country, on work he had done in that area.

In August 2007 he sent a written complaint to the European Commission, whose reply was that he should bring the matter to the relevant administrative or judicial authority in the relevant country.

November 2007 he opted for the 12 months training and he was verbally informed that the competent authority would stipulate the details of this.
June 2008 he had heard nothing about the compensation measure but supplied further information to the Ministry about the seismic engineering covered in his degree.
November 2008 he was informed that his case would be reassessed by the same 3-member committee. In July 2009 he was informed that the same member representing the competent authority had requested a postponement and has heard nothing more since.
ICE advised him in 2009 to contact SOLVIT but he did not do so.

13 January 2014

Our ref: ICAEW Rep 07/14

By email only: balanceofcompetences@bis.gsi.gov.uk

Dear Sir/Madam

Single Market: Free Movement of Services review

ICAEW welcomes the opportunity to comment on the call for evidence *Single Market: Free Movement of Services review* published by Department for Business Innovation and Skills on 21 October 2013, a copy of which is available from this link.

ICAEW is a world-leading professional accountancy body. We operate under a Royal Charter, working in the public interest. ICAEW's regulation of its members, in particular its responsibilities in respect of auditors, is overseen by the UK Financial Reporting Council. We provide leadership and practical support to over 140,000 member chartered accountants in more than 160 countries, working with governments, regulators and industry in order to ensure that the highest standards are maintained.

ICAEW members operate across a wide range of areas in business, practice and the public sector. They provide financial expertise and guidance based on the highest professional, technical and ethical standards. They are trained to provide clarity and apply rigour, and so help create long-term sustainable economic value.

This response reflects consultation with the ICAEW Business Law Committee which includes representatives from public practice and the business community. The Committee is responsible for ICAEW policy on business law issues and related submissions to legislators, regulators and other external bodies.

Scope of response – company law

1. We are responding to this call for evidence in so far as it relates to company law only (paragraphs 31-36 of the call for evidence).

2. Company law is a potentially broad subject and we have focussed on areas which we regard as being core to company law rather than, for example, areas of overlap with the free movement of capital (such as laws regulating trading of shares). We have particularly focused on those areas where the EU has already had an impact or has sought to have an impact.

   This includes relevant areas covered by section 4 of the current EU Action Plan of December 2012[1] ('**2012 Action Plan'**) and the related consultation on the future of company law[2] ('**2012 Consultation'**), on which we commented in our response of May 2012[3] **('2012 Response**'). Much

[1] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2012:0740:FIN:EN:PDF
[2] http://ec.europa.eu/internal_market/consultations/docs/2012/companylaw/questionnaire_en.pdf
[3] http://www.icaew.com/~/media/Files/Technical/icaew-representations/2012/icaew-rep-72-12-eu-consultation-on-the-future-of-company-law.pdf

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of the 2012 Action Plan relates to transparency and corporate governance issues on which we do not comment.

3. The relevant laws or potential laws are generally based on freedom to provide services, in particular freedom of establishment. We are, therefore, commenting on these issues in response to this call for evidence and not the (HM Treasury) call for evidence on the single market for financial services and free movement of capital[4], even if there may be some overlap.

Main points

4. In our view, EU company law should facilitate the efficient operation of the single market, but there needs to be a balance (ie, to avoid unnecessary/excessive burdens) and, therefore, we believe the objectives of EU company law should be to facilitate cross-border business, to facilitate cross-border mobility and restructuring for companies, and to facilitate the cross-border ownership of companies and transfers of ownership. Such a competence is what is necessary for the EU. Any further competence would not only be unnecessary but, as outlined further below, be inappropriate.

5. There continues to be a wide diversity of company law within Europe. This is not necessarily a bad thing, and can have positive consequences. It enables each individual member state to respond to local business demands and promotes innovation whilst leaving other member states free to adopt successful models (and disregard unsuccessful models). This is a dynamic model in contrast to a harmonised model where it can be a difficult and lengthy process to bring about change with results that can stifle business.

6. The differences between national laws are extensive and reflect different legal and political systems, historical development and sometimes other aspects of the national environment, such as tax law. A truly harmonised company law would therefore require major change in at least some member states or the creation of a separate, comprehensive self-contained regime. We do not see that the former is desirable or necessary for freedom to provide services. The practical difficulties regarding the latter are evident from the history of current EU forms (which are still reliant upon national laws in many respects and which have only very slight take-up) and some of the irreconcilable differences (eg, one vs two-tier boards and real-seat vs incorporation doctrines).

7. The focus of the Treaty on the Functioning of the European Union ('TFEU') on freedom of establishment in this context is well judged so as to promote freedom to provide services for business irrespective of this diversity. Company law harmonisation measures should be focused on this objective and not seek to harmonise national laws for the sake of harmonisation alone (or to introduce changes in other areas of competence, such as employment).

8. Freedom of establishment of companies is well established in Europe. This has in part been achieved through the Treaty provisions as applied by the Court of Justice. In some cases legislative measures have also been helpful although we believe that some measures have been unnecessary or ineffective.

9. The EU should focus on the limited areas where the work remains unfinished and business is tangibly impeded as a result. There are only a couple of areas where we believe further EU intervention is merited. We comment further on these matters in answer to Q11 below. On the other hand, certain of the EU's proposed initiatives should not be pursued, for instance, consolidation of directives (which are addressed to member states and so a matter of little, if any, direct interest to companies and their owners) or new corporate forms (for reasons outlined further below).

10. As regards EU corporate forms, it is unclear on what basis new forms would be required if current obstacles to freedom of establishment were to be removed. A business would be free to select from

[4] https://www.gov.uk/government/consultations/balance-of-competences-review-single-market-financial-services-and-the-free-movement-of-capital

the numerous national forms already available in the EU and conduct business through freedom of services rights (whether through creating establishments/ branches or subsidiaries). Neither the EU private company (SPE) nor the EU single member company initiatives appear to have been justified by the relevant criteria. We have commented more fully on these issues in our responses to the relevant consultations[5]. The EU should focus on removing remaining obstacles rather than considering new corporate forms the purpose of which (in part) is to navigate those obstacles.

11. With a couple of exceptions, most notably establishments/ branches, we do not see evidence that conduct of EU-wide business through companies is at present being significantly held back by company law (as opposed to, for instance, employment or tax law). Further company law measures should, therefore, only be adopted if the case for change has been demonstrated in tangible terms.

Paragraphs 31-36 of the call for evidence – EU powers and objectives of harmonisation

12. As noted in paragraph 31 of the call for evidence, the basis for company law legislation derives from the freedom of establishment provisions of the TFEU. There is a risk that the treaty provisions are relied upon selectively in support of harmonisation initiatives. In particular, Article 50(2)(a) requires the EU bodies to accord 'as a general rule, priority treatment to activities where freedom of establishment makes a **particularly valuable contribution to the development of production and trade**'; it is difficult to see that all proposed initiatives are consistent with this.

13. The provisions are also subject to the principle of subsidiarity[6], but company law initiatives do not always appear to have sufficient regard to this. For instance, as noted in the UK Government's report '25 Ideas for Simplifying EU Law'[7], it is unclear why capital maintenance rules require the degree of harmonisation imposed by the second company law directive or why the third and sixth company law directives (which concern largely domestic issues) are required at all.

14. Paragraph (3)(g) of Article 50 provides for coordination of 'safeguards which, for the protection of the interests of members and others, are required by Member States of companies or firms….with a view to making such safeguards equivalent throughout the Union', but only '***to the necessary extent.***'

15. Paragraph 32 of the call for evidence states that EU objectives for achieving agreements to proposals in the area of company law include:
(1) providing equivalent protection for shareholders and other parties concerned with companies;
(2) fostering efficiency and competitiveness of business;
(3) promoting cross-border cooperation between companies in different Member States;
(4) ensuring freedom of establishment for companies throughout the EU; and
(5) stimulating discussions between Member States on the modernisation of company law and corporate governance.

16. Some of these appear to be broader objectives than those stated in Article 50 and it is not clear to us on what legal basis they are founded as EU company law objectives. If they are taken to be general objectives of the EU, then care needs to be taken that the EU does not exceed its competences in the company law context. In particular, it is unclear in what respects company law might be changed in pursuit of objectives (2) (beyond the ability to carry on business through a company, which is already universally established), (3) or (5). Objective (1) needs to be tempered, as required by article 50, by the provisos 'to the extent necessary' and 'where [it] makes a particularly valuable contribution'. Without those, objective (1) becomes a mandate for harmonisation for harmonisation's sake, which we would not support; for example it would lead to

[5] http://www.icaew.com/~/media/Files/Technical/Legal-and-regulatory/legal-cons-reps-tech-releases-ect/icaew-rep-149-08.pdf and http://www.icaew.com/~/media/Files/Technical/icaew-representations/2013/icaew-rep-123-13-ec-single-member-limited-liability-companies.pdf.
[6] http://europa.eu/legislation_summaries/glossary/subsidiarity_en.htm
[7] http://www.administrative-burdens.com/filesystem/2008/07/25_ideas_for_simplifying_eu_law_517.pdf

harmonisation as to what duties a company might owe and to whom – this is the kind of thing that is in practice unachievable and unnecessary (we are not aware of tangible evidence that lack or harmonisation is holding back freedom of establishment). We consider that these broad issues should not be pursued through changes to EU company law.

17. Paragraph 36 notes the 2012 Action Plan. We comment on some of the specific topics covered by the plan (as well as relevant topics omitted) further in answer to Q11 below and have noted above some broad areas covered by the plan which are beyond the scope of our response.

18. We consider that the explanations given by the EU on why it has decided to pursue, or not to pursue, a particular initiative are insufficiently reasoned or focused on the Treaty provisions cited above. In particular, there is little hard evidence provided as to what the tangible benefit to business would be for a given proposal, but this should (eg under Article 50(2)(a)) be the driver of these initiatives. The costs of pursuing initiatives (including the consultation elements of an initiative) are also often not adequately quantified.

19. The 2012 Action plan cites percentages of responses to the 2012 Consultation as evidence of support for proposals. For instance, it notes that 'more than 75% of respondents' asked for some form of consolidation of company law directives. Yet a numerical approach of this kind is by no means necessarily appropriate in gauging a genuine business need for any proposal. According to the Feedback Statement to the 2012 Consultation, only 5% of respondents were (non-financial) companies. Neither is the approach necessarily appropriate to gauge whether action is required at an EU level (as opposed to a national level). For instance, out of 496 responses, 115 were from a single country (Spain).

20. The 2012 Action plan also cites other sources to justify its approach, including the Commission's 'Europe 2020' Communication[8] and the European Parliament Resolution of June 2012.[9] Yet these documents make certain assertions (for instance, the Resolution provides that that 'conflict of law' issues need to be tackled and that an EU private company statute should be pursued) without providing evidence as to how the conclusion was reached in terms of EU competencies or even a clear idea of the scale of the apparent single-market problem to be overcome and how the initiative would achieve that (both in terms of effectiveness and at what price in additional burdens).

Call for evidence - Specific questions

21. We comment below on those of the specific questions in the call for evidence which appear most relevant to company law.

Q1.What do you see as the advantages and disadvantages of EU action on the free movement of services? How might the national interest be served by action being taken at a different level (for example, at the World Trade Organisation level, or at the national level), either in addition to or as an alternative to EU action?

22. We believe that, in principle, freedom of movement of services in the EU is in the national interest and if brought about in accordance with the principles outlined in this response, it is appropriate for the occasional necessary action to be taken by the EU. However, the EU should have due regard to international practices in taking action so as ensure that EU business is not unnecessarily burdened. Although the EU legislation on accounting standards is generally outside the scope of this response, we note that the adoption by the EU of global accounting standards is a good illustration of how EU can act in a way which is helpful to business by having due regard to

[8] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:2020:FIN:EN:PDF
[9] http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2012-0259+0+DOC+XML+V0//EN.

international practices. Apart from this, we do not see a case for pursuing the internal market's freedom of establishment through global initiatives on company law.

Q5. In your experience do Member States take a consistent approach to implementing and enforcing EU rules, or not?

23. We believe that there is considerable inconsistency in implementation and enforcement and that this is significant in the context of establishment of, and information concerning, establishments/branches.

24. In some cases EU legislation may permit flexibility in implementation and there is nothing inherently wrong with a degree of variance between member states (for instance, where there are options to accommodate different member state practices). However, some variances may result in obstacles to freedom to provide services, for example, as mentioned, rules relating to company establishments/branches vary considerably (and we comment further on that issue below).

25. As a purely domestic comment, the UK 'copy out' approach is one which may not operate to the advantage of UK business where (combined with the interpretative approach of UK courts) it results in the UK adopting a more onerous approach than is adopted by other member states.

Q9. Should decisions affecting the integrity of the Single Market be taken by all Member States and apply equally to all, or do you believe it is possible to take further liberalising action either unilaterally or with a selection of other Members States, whilst maintaining the integrity of the Single Market?

26. There are some decisions which should be taken by all member states and applied equally to all in order for the single market to operate as a single market. The relevant areas are identified in TFEU as noted above and should be applied with due regard to principles of subsidiarity.

27. Subject to that, there is rightly nothing to prevent member states developing their company laws as they wish. Similarly, it would be possible for groups of member states to pursue initiatives together, in the sense of in parallel to one another. That would, of course, need to be done in a way compliant with other EU laws (eg, the relevant laws should not discriminate against persons from other member states), and it would be easier where common legal doctrines apply (for instance, in respect of transfer of registered office, whether the 'head office' doctrine applies) in the relevant member states.

28. We consider in answer to Q11 below to what extent existing and proposed EU company law is required at an EU level or could properly be left to member states.

Q11. What do you see as the advantages and disadvantages of EU action on company law? To what extent do you believe that the cost of existing or future European rules in this area is proportionate to the benefits?

29. While TFEU envisages that directives will be required to attain freedom of establishment for particular activities (Article 50(1)), we note that the Court of Justice has also played a significant role in shaping laws on freedom of establishment and may be called on in future to help enforce the legislation in this area where there is uncertainty (for instance in relation to transfer of seat).

30. As regards existing company law directives, we believe that some provisions have afforded benefits proportionate to costs. In particular, the cross-border mergers directive has facilitated cross-border corporate transactions and mobility of companies in the EU which could not

efficiently have been achieved by other means, and the first company law directive and (to a limited extent) the eleventh company law directives have been useful in requiring basic information on companies and establishments (respectively) to be made publicly available to the benefit of those wishing to trade with them.

31. However, a number of existing provisions are not, in our view, necessary and costs will have been incurred in implementing them which could have been avoided. For instance, the third company law directive on mergers of public companies concerns mainly domestic issues and the accounting directive is, in our view, unnecessarily prescriptive.

32. As regards future European rules, we have the following comments on the proposals in section 4 of the 2012 Action Plan:

- **Transfer of Seat** – we agree both that there is a potential concern in this area and also that, as always, the case for change needs to be substantiated and we therefore welcome the Commission's proposal to consult further.
- **Cross-border merger regulation** – we agree with the Commission both that this has been a useful initiative and that it could usefully be updated to reflect practical experience to date and welcome the proposals to consider further.
- **Cross-border divisions** – we support the Commission proposal to consider this further but whether or not the benefits of introducing new legislation would merit the costs requires a costs/benefits analysis.
- **Smart legal forms for European SMEs** – it is not clear to us why the EU wishes to keep this on the agenda, notwithstanding lack of approval for an SPE by the Council and its discontinuance of the proposal for an EU single member company. Most importantly, no hard evidence has been provided to date that the absence of EU forms materially impedes freedom to provide services. While it might be considered that there is no harm in offering another alternative to business, it would be a vast undertaking, and a cost to EU taxpayers, to set up a stand-alone, comprehensive pan-European company law; there are inevitably costs for would-be companies and their owners in considering yet more alternatives; and we believe that those resources could be better directed elsewhere.
- **Promoting and improving awareness of the SE and SCE** – again, the Commission quotes a percentage (61%) of respondents to the 2012 Consultation as offering support for 'revising' EU legal forms in general, but this is an inadequate explanation, for the reasons noted above. We agree with the Commission that resource should not be spent on revision of existing forms. However, we do not agree that resource should be spent promoting the EU forms. In our view, the priority of the Commission should be to address any outstanding impediments to freedom of establishment in relation to existing national forms, and resource should be used to meet that objective or, failing that, to more pressing reforms outside of the field of company law.
- **Groups of companies** – we do not think that there is a need for this and do not see that any benefit in introducing a 'comprehensive legal EU framework covering groups of companies' would justify the costs involved. We therefore welcome the fact that the Commission appears disinclined to pursue that initiative. Even the more limited initiative now under consideration would need to be justified on a cost/benefits basis.
- **Codification of EU company law** – this will inevitably result in costs (both EU functionaries and member state governments and business through advisors and advisory bodies), including to ensure that the exercise is nothing more than a 'consolidation'. We do not believe these costs are merited for something that has no direct impact on business. If the exercise were to be accompanied by a deregulatory initiative to repeal unnecessary provisions, that might be worthwhile, but that does not appear to be in contemplation.

33. An important area where freedom of establishment could be improved and which is not covered by the 2012 Action Plan relates to the freedom of a company in one member state to open an establishment (or branch) in another. The eleventh directive covers disclosure requirements, but in practice the process for creating establishments varies greatly between member states and it can be easier to establish a subsidiary than an establishment/branch in some member states. In practice, the availability of information on establishments also varies between member states. If this issue were to be addressed fully (whether through better enforcement or further harmonisation – perhaps a maximum harmonisation directive in order to prevent members states from imposing too many layers of requirements – or both), business would have an easy and cost effective way to operate on a cross-border basis without the need for reforms in other areas (such as new EU forms). There is also direct TFEU authority for the Commission to pursue this - paragraph (f) of Article 50(2) requires '….the progressive abolition of restrictions on freedom of establishment in every branch of activity under consideration, both as regards the conditions for setting up agencies, branches…..'

34. We comment in more detail on many the issues raised in the 2012 Action Plan (and other potential EU proposals) in our 2012 Response.

By email to: balanceofcompetences@bis.gsi.gov.uk

13 January 2014

Dear Sir/ Madame,

Balance of Competences Review: Free Movement of Services – Call for Evidence

1. The Institute of Chartered Accountants of Scotland ("ICAS") is the professional body of accountants for over 20,000 members who advise and lead businesses across the UK and in almost 100 countries around the world. Almost two thirds of our working membership work in business, many leading some of the UK's and the world's great companies. The others work in accountancy practices ranging from the Big Four to small practitioners.

2. We welcome the opportunity to comment on this Call for Evidence. The ICAS Charter requires it to act primarily in the public interest, and our responses to consultations are therefore intended to place the public interest first. Our Charter also requires us to represent our members' views and to protect their interests, but in the rare cases where these are at odds with the public interest, it is the public interest which must be paramount.

Our key messages on public procurement

3. The rules are complex, this is incompatible with achieving greater effectiveness and we would welcome further simplification. Our members in business and practice reported that the public procurement process is overly prescriptive and burdensome. There are concerns that the organisation does not come out of the procurement process with a better result. It is slow and costly to implement and as a result, disadvantages small suppliers who do not have the resource to absorb this. In addition, we would also highlight that grant procedures are arduous and too detailed.

4. In our view, the EC procurement thresholds are set too low, particularly for supplies and services which can range from as low as €80,000. There is minimal if any cost benefit to apply procurement rules at current levels, given their arduous administrative burden. Our preference is for the rules to be applied at a much higher threshold, at least €1m or even better, €5m. Secondly, tendering is based on the full life cycle rather than annual amounts – again this is too low and it brings in too many lower value projects. Our view is that it should be on the annual amount to avoid lower cost annual contracts being brought into the EC procurement rules.

We hope this is helpful.

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Balance of Competences Review
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Submitted by email: balanceofcompetences@bis.gsi.gov.uk

13 January 2014

Dear Sirs

ICSA response to Call for Evidence: Single Market: Free Movement of Services review

We welcome the opportunity to provide evidence for your review of the Balance of Competences between the UK and EU in relation to the Single Market: Free Movement of Services. The Institute of Chartered Secretaries and Administrators (ICSA) is the international professional body that qualifies Chartered Secretaries and represents Company Secretaries as a whole. We frequently engage with relevant new legislative proposals at both EU and UK level on behalf of our members.

As ICSA represents the views of Company Secretaries, we have confined our response to the section on Company Law and Question 11 of the consultation questions, as this is our area expertise.

Q11 What do you see as the advantages and disadvantages of EU action on company law? To what extent do you believe that the cost of existing or future European rules in this area is proportionate to the benefits?

We agree that some level of harmonisation of company law and corporate governance is important in facilitating the establishment of companies across the EU (as noted in paragraph 31 of the consultation document). However we would also highlight the critical need to recognise the widely differing legal frameworks, business practices and ownership structures of member states (paragraph 36 of the document). We have concerns that these differences are sometimes overlooked, and the effects on different member states not understood, when proposals for changes in EU law are being drafted.

Paragraph 6 of the consultation document highlights that the EU must act in accordance with the principles of subsidiary and proportionality but our experience is that proposals on company law and corporate governance do not always appear to apply these principles. In particular we find that many proposals go beyond what is necessary to achieve the objectives of the EU treaties (proportionality).

We also have concerns that timely cost/benefit analyses and impact assessments are not always completed. It is our view that a cost/benefit analysis and impact assessment should be carried out when proposals are being formulated. However, it is our experience that these seem either to be carried out too late in the process, or not at all, and do not seem to be sufficiently rigorous.

It can sometimes be difficult to see clear benefits from EU proposals that are not thought through sufficiently at the outset, and where there is a lack of clear understanding about the issues, or substantiation of a claimed need for action at EU level. The impact of proposals on individual member states is not always understood sufficiently and evidence of the benefits to be achieved can sometimes be lacking. Proposals that are not sufficiently thought through can result in unintended consequences and/or a substantial amount of time, effort and cost spent by all those involved in negotiating amendments and finding a workable position. The recent proposals on Audit Reform are an example of this.

In our view, there are clear advantages to a level of harmonisation and appropriate EU action on company law; however it is important that proposals for EU action comply fully with the principles of subsidiarity and proportionality. It is also important that the benefits of proposed action outweigh the costs, and that a thorough and rigorous impact assessment is carried out at an early stage. It is our experience that, when this is not the case, the outcome is often costs that are disproportionate to the perceived benefits.

Our basic position is that we favour a national policy approach in most cases unless there is a clear cross-border dimension to the issue. Examples of the latter would include law that facilitated cross-border mergers or divisions, or the transfer of company seat across borders. Our views are broadly consistent with the report of high level experts on EU company law published in April 2011.

Based on this 'cross-border' principle, much of the EU policy agenda of recent years, e.g. relating to the reform of the audit market, Viviane Reding's proposals on gender quotas for NEDs, narrative reporting proposals, etc, goes beyond our preferred role for the EU. In our view, such initiatives are not primarily about promoting cross-border business activity, but are mainly concerned with imposing a distinctive vision of corporate governance/company law regulation across the EU. This is not a policy agenda that we favour.

Dr. Roger Barker
Director of Corporate Governance and Professional Standards

Balance of Competences Consultation Response

Free Movement of Services

January 2014

This is a joint response from the Law Society of England and Wales and the Law Society of Scotland (the Law Societies).

The Law Society of England and Wales is the independent professional body, established for solicitors in 1825, that works globally to support and represent its 166,000 members, promoting the highest professional standards and the rule of law.

The Law Society of Scotland is the professional body for Scottish solicitors, established in 1949. It is not only the representative and regulatory body for all practising Scottish solicitors but also has an important duty to work towards the public interest.

Introduction

I. UK membership of the EU has brought significant benefits to solicitors, law firms and their clients, most particularly through the ability to trade, provide services and establish across the EU and to seek effective redress to cross-border legal issues.

II. The legal services sector plays a key role in the UK economy, the UK's competitive advantage and in improving the efficiency of doing business. Legal services directly contributed £27.2bn[1] in turnover to the UK economy in 2011. This included almost £4bn of exports – a substantial volume of which was generated through trade with EU Member States.

III. The UK legal services sector is globally focussed with offices and lawyers based throughout Europe and the world. Law firms exist in order to service the needs of their clients; these are commonly British businesses trading throughout the Internal Market and increasingly non-British clients doing business in the Internal Market.

IV. The legal profession works day-to-day with clients throughout the EU dealing with a broad range of legal issues across a diverse range of fields, from commercial transactions, intellectual property and competition law to employment law, civil and criminal justice and dispute resolution.

V. It is for these reasons that the Law Societies and the legal profession have an interest in the stability of the UK's position within the EU and the future role of the UK at the heart of EU rule-making.

VI. The Law Societies nevertheless accept that there is a debate as to the appropriate level of EU competence in various policy areas and will input into the other reviews of the balance of competences of most relevance to the legal profession.

[1] http://www.ons.gov.uk/ons/rel/abs/annual-business-survey/2011-revised-results/index.html

Question 1 - What do you see as the advantages and disadvantages of EU action on the free movement of services? How might the national interest be served by action being taken at a different level (for example, at the World Trade Organisation level, or at the national level), either in addition to as an alternative to EU action?

Advantages

1. The free movement of services is a fundamental pillar of the EU. National actions tend to create obstacles; therefore it is more desirable for action on the free movement of services to be taken at EU level to ensure consistency throughout the Internal Market.

2. EU action on the free movement of services is vital in creating the level playing field that is part and parcel of the single market project. Without EU action, creation of a single market for services would be impossible. The rules must of course comply with the principle of subsidiarity and be effective and fit for purpose.

3. Action at EU level increases legal certainty as it is easier for businesses to comply with a single system of rules and regulations than be required to adhere to different rules for each Member State in which they wish to establish or provide services. Firms wishing to exercise their right to provide cross-border services or establish in another Member State also benefit from reduced legal costs and other ancillary expenses linked with the need to comply with multiple systems.

4. Once agreement on a particular matter has been reached at EU level, the ability to speak with one voice also strengthens the position of EU countries in negotiating international treaties. The fact that the EU can demonstrate that the rules it is suggesting do work in practice may also serve to strengthen its case.

Disadvantages

5. There is a possible disadvantage in that maximum or minimum harmonisation rules may constrain the UK's ability to put in place national rules to deal with UK-specific issues. One example of where this has caused contention is in relation to minimum pricing of alcohol in Scotland.[2]

6. It is also important that in some sectors, where the UK is "ahead of the curve", it is not limited by EU rules. However, in the area of services it would more often be the case that such sectors would be limited from lack of integration, e.g. digital and energy services where if markets were more integrated these providers would have a larger customer base.

[2] For example, the provision at Section 1 of The Minimum Unit Pricing (Scotland) Act 2012 which sets out a mandatory condition of licence that alcohol must not be sold below its minimum price was introduced by the Scottish Government as a health measure to counter the effect of harmful drinking in Scotland.

This provision has not yet been enacted as it is at present subject to a legal challenge made on the basis inter alia that the provision is outwith the competence of the Scottish Parliament as it breaches EU law and in particular Article 34 of the Treaty on the Functioning of the European Union which prohibits quantitative restrictions on imports and all measures having equivalent effect between Member States.

Action at another level

National level

7. If all action were taken at a national level then trade opening among the current 28 Member States would need to be negotiated and enforced on a bilateral basis - 27 different treaties if the UK wished to continue trading with all other EU countries. From a legal point of view this would mean dealing with 27 different legal systems and regulatory regimes, significantly increasing complexity for businesses in providing services across borders.

8. Whether action is better taken at EU as opposed to national level, or *vice versa*, depends to a large extent on the subsidiarity principle which is discussed in further detail below.

Action at a higher international level

9. It is not practical for all action to be taken at WTO level, whether through the WTO itself or some other international organisation. One of the most difficult aspects of creating international rules is reaching agreement between a large number of parties. This task, although still challenging, is easier among the 28 Member States at the EU negotiating table than it is on the wider global level.

10. Although improvements could be made, the EU nevertheless operates on a sophisticated legal framework with common rules facilitating a level of services integration far above that usually achieved in international agreements. It would not be realistic to expect that such rules could be agreed at the international level. It should also be noted that the existence of practical problems surrounding trade in services or establishment can be dealt with more quickly and effectively at EU rather than WTO level.

11. Considering for instance the inability to reach a conclusion on a comprehensive agreement on trade under the auspices of the WTO, it does not appear feasible that the WTO could work as an alternative forum for international agreement on trade in services.

12. Despite the more complex decision-making system of the EU, as compared to national level, the EU is a more dynamic polity vis-a-vis other international intergovernmental fora. This includes a higher degree of transparency and possibility for dialogue between decision-makers and stakeholders. Specific problems can be identified and, if deemed appropriate and necessary, resolved through a legislative and democratic process. It is possible to raise concerns with the Commission, for instance when it is carrying out a consultation, on a bilateral basis or through national representatives in Council or Members of the European Parliament (MEPs).

13. The EU legal framework is unique in that it allows individuals and businesses to enforce their rights under the rules on the free movement of services and freedom of establishment within the EU (as with the other freedoms) much more efficiently than would be the case in a traditional free trade area.[3] This includes the possibility of relying directly on the Treaty provisions.[4]

[3] However, in the consumer context it is not always the case that the EU legal order always succeeds in making it easier for consumers to enforce their contractual rights. This is one of the reasons why

14. Furthermore a variety of legal instruments secure individuals' and businesses' access to justice, for example through the promotion of alternative dispute resolution[5] and mediation, the free movement of judgments, and common rules on choice of law found in Rome I and Rome II.[6] Again these are special features of the EU framework which it would not currently be practicable to pursue on a wider international level.

Question 2 - To what extent do you think EU action on the free movement of services helps or hinders UK businesses?

15. As a general rule the Law Societies consider that EU action in this area helps UK businesses. Benefits emanate from harmonisation of rules, reinforced by the Commission's ability to bring enforcement actions for non-compliance.

16. The UK legal services industry itself has benefited enormously from access to the Internal Market and the ability to provide services to clients throughout the EU. Law and legal services underpin every aspect of the functioning of the Internal Market. The founding freedoms upon which the Internal Market is based apply to lawyers and legal firms directly, enabling them both to work and to establish in other European countries and to provide legal services across borders. In this last respect access to the Internal Market provides access to a very broad client base. London in particular is recognised as one of the main legal hubs within the EU for businesses based in other European countries or across the globe which are seeking advice on EU cross-border issues.

17. There are a number of direct benefits which it may be possible to quantify such as:
    a. the value of export or cross-border provision of services within the Internal Market;
    b. investment from other EU countries; and
    c. the number of services jobs estimated to be dependent on the Internal Market.

18. However, the Internal Market also allows the UK a greater say in global trade. The combined power of the EU trading bloc is a major asset in negotiating Free Trade Agreements (FTAs) with countries across the globe in turn multiplying the effect of the Internal Market and providing further potential benefits for UK businesses.[7] While it may be difficult to quantify or assess these benefits in monetary terms, it remains an important factor which should be taken into account in assessing the economic benefit of the Internal Market

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the Law Societies supports initiatives such as that on Alternative Dispute Resolution in consumer disputes and Consumer Rights Directive (see further on both of these below). The Law Societies consider that ADR and clear rules on the provision of information to consumers have the capacity to increase efficiency in this regard but it will not be possible to carry out an assessment until they have been implemented and are in operation.

[4] See further in relation to question 3 below.

[5] The recent Directive on Alternative Dispute Resolution (ADR) (2013/11/EU) is limited to resolution of disputes between businesses and consumers. The Law Societies are in favour of initiatives to promote ADR for consumer disputes although does not think that an EU initiative along the same lines for the promotion of business to business ADR is currently required.

[6] The choice of law rules can be found in the Rome I and Rome II Regulations. The fact that there is also free movement of judgments (made much easier by the Brussels I Regulation and Lugano convention) with enforcement of UK courts' judgments across the Member States and EEA states, also serves to make the court system in the UK more attractive to EU and non-EU litigants.

[7] See also in relation to question 7 below.

Question 3 - To what extent has EU action on the free movement of services brought additional costs and/or benefits when trading with countries inside and outside the EU? To what extent has EU action on the free movement of services brought additional costs and/or benefits as a consumer of services?

19. The Law Societies do not consider that the Internal Market has brought any additional costs when trading with countries either inside or outside the EU. On the contrary, it considers that it has resulted in significant benefits.

20. Membership of the EU brings advantages to the UK in a wider international context. As noted above the combined economic power of all 28 Members States provides a significant advantage when negotiating major FTAs with other countries throughout the world.

21. From the domestic perspective, it should also be remembered that the UK is often used as a gateway to the rest of Europe. A number of practical and pragmatic elements feed into this including the accessibility of the English language. The UK has a good reputation for upholding the rule of law and English law[8] in particular is recognised globally in the context of international commerce . All these factors contribute to the perception of the UK as a whole, and London in particular, as a global hub for all things trade-related, from financial services and investment opportunities to the daily activities of the companies themselves. This "gateway" function is inextricably linked to the UK's position within the Internal Market and the EU as a whole.

22. A particular example of a benefit of the Internal Market from the perspective of parties outside the EU is that UK judgments involving a non-EU party may be enforced in other Member States or EEA states. This reinforces the attractiveness of using the law of the UK jurisdictions as jurisdiction of choice.

23. There is also a general benefit to the public in having services freely available throughout the EU from a practicality and convenience point of view, from the point of view of consumer choice, and in promoting open competition which is seen as an essential part of a healthy economy.

Question 4 - How well, or otherwise, have the EU's mechanisms for delivering the free movement of services worked?

24. The mechanisms employed for delivering the free movement of services thus far have been reasonably successful but there is still further work to be done, including in relation to technical and enforcement problems which create barriers to the smooth functioning of the Internal Market.

25. In relation to free movement of legal services, the ability to establish in other Members States has been of significant benefit to those firms wishing to grow their business and offer legal services across the EU.

[8] The Law Society of Scotland points out that Scotland has a distinct legal system, but while Scots law differs from English law in a number of respects, in the matters to which this response refers these differences are not material.

26. The current Lawyers' Directive is generally regarded by solicitors as working well, although there are some areas in which modernisation is desirable. Considering that the Lawyers' Directives date back to 1977 and 1998 respectively,[9] it is unsurprising that the legal framework does not appear fully to cater for all the challenges of twenty-first century legal practice. Examples of this are the lack of provision for legal firms operating as alternative business structures (also known as ABSs) and various technological developments, including issues surrounding data protection. Nevertheless, further legislation should take careful account of what works and does not work under the current system and plug the gaps where these exist.

27. One of the most important mechanisms for delivering an Internal Market for services has been the potential for direct applicability and enforceability of the Treaty. The direct effect of Articles 49 and 56 of the Treaty on the Functioning of the European Union (TFEU) has proven to be effective in preventing attempts by one Member States at discrimination or protectionism against providers of services in, or from, other Members States. The UK legal system has embraced the concept of judicial cooperation built on the referral system and principle of direct effect since the latter was affirmed by the case of *van Gend en Loos*.[10]

28. The development of competition law at EU level has been one of the great successes of the Internal Market. The EU competition rules have been taken up as the template for competition legislation in many, if not all, EU Member States. The EU competition rules and those on state aid granted by Member States are essential features of the EU system and bring many practical benefits.[11] The latter, in particular, are viewed as having greatly reduced the practical ability of Member States to subsidise their own leading companies and thus as having made a significant contribution to the ability of UK business to take advantage of the Internal Market.

29. The EU competition rules are not, however, perfect, and further work may need to be done, for example, on the conditions around when Member States can control mergers to safeguard national security and freedom of expression and to ensure financial stability (banking, insurance, etc). [12]

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[9] The Lawyers' Services Directive of 1977 and the Lawyers' Establishment Directive of 1998. These are supplemented by a further general directive: the Mutual Recognition of Diplomas Directive of 1989.

[10] Case 26/62 *van Gend en Loos* [1963] ECR 1 – Court of Justice

[11] (a) What is now Article 101 TFEU has been very effective at breaking down intra-EU and global cartels, where in the past national industries often ran "no-poaching" understandings with their competitors in other Member States;
(b) The EU Commission has operated as an efficient enforcement body, with strong powers to detect and deter restrictive practices at EU level;
(c) Competition law is now accepted as a key tool of economic development in its own right across the EU; all EU Member States now have national legislation mirroring the EU competition rules;
(d) The EU merger control rules are effective at controlling larger mergers with an EU wide impact; a patchwork of national merger controls showed itself less well able to deal with large mergers affecting several EU markets;
(e) Further, the rule that the effect of a merger on competition is the only criterion used at EU level to decide whether to approve a merger has greatly reduced the practical ability of individual Member States to block mergers on protectionist grounds or to favour their "national champion". (In line with this approach, the UK's powers to control mergers on the grounds of national interest under the Industry Act have been revoked).

[12] See Article 21 of the EC Merger Regulation (Council Regulation 139/2004 on the control of concentrations between undertakings) which allows exemptions to the Regulation in the case of "legitimate interests" including public security, plurality of the media and prudential rules.

30. It should also be noted that a genuine internal market, and in particular the free movement of services, goes hand in hand with the free movement of people.[13] If you are allowed to offer your services or establish in a different Member State, then it is only logical that the people involved are legally entitled to reside there also. Action to promote the free movement of people has therefore bolstered the effective provision of services and ability to exercise the right of establishment.

31. Service providers have benefited enormously from the ability to establish cross-border but this is facilitated by the free movement of key personnel across borders, to provide expertise and continuity in the opening stages and coordination and continuity of a multi-national or even pan-European business. Free trade in goods would be similarly ineffective if you were unable to set up a local marketing or sales department and post somebody from head office to that Member State for the purpose of setting up such a subsidiary or branch.

32. 76% of the UK Top 50 law firms have at least one office elsewhere in the EU. Opening new offices stems from freedom of establishment and this is underpinned by the possibility for firm employees to move to those new locations.[14]

Question 5 - In your experience do Member States take a consistent approach to implementing and enforcing EU rules, or not?

33. The need for coordinated EU action regarding the Internal Market relates back to the concept of a level playing field. A certain level of standardisation is needed to prevent Member States from introducing national provisions that indirectly favour national businesses and *de facto* create new trading barriers. The level playing field does not relate solely to equal access but also to preventing competition in the Internal Market being skewed by overly large differences in legislation that directly and/or indirectly affect the costs of running a business. Implementing and enforcing EU rules correctly is therefore vital to the efficient functioning of the Internal Market.

34. However, the implementation and enforcement gap remains one of the single most important factors behind the still fragmented single market in services. While of course there would be significant scope for further regulatory changes to open up Member State markets, subject to political will, much could be achieved if current rules were more evenly and consistently respected.

35. One other element is that the Services Directive in particular leaves significant provisions in it open to interpretation, thus resulting in different implementation in each Member State according to existing systems and measures in place.

36. The lack of implementation, and more so enforcement, does not necessarily occur deliberately so as to favour domestic parties, but because directives by their very nature are couched in general terms. For certain parts it may simply be a question of lack of

[13] This is explored further in the Law Society of England and Wales response to the consultation on Free Movement of People available here http://www.lawsociety.org.uk/representation/policy-discussion/documents/balance-of-competences-review-free-movement-of-persons/ .
[14] See also the Law Society of England and Wales' response to the Balance of Competences consultation on the Free Movement of Persons available here http://www.lawsociety.org.uk/representation/policy-discussion/documents/balance-of-competences-review-free-movement-of-persons/.

knowledge of the rights and obligations under EU *acquis* both on the part of public authorities and businesses or sole traders.

37. The Law Societies believe that UK businesses could to a large degree benefit from better implementation and enforcement of EU services legislation. Without this, documentation and compliance requirements at a national or local level may result in entry and market access requirements which are in fact incompatible with legislation. However, pressure on Member States to enforce the *acquis* would require a significant increase in or reprioritisation of resources in the Commission as well as a shift in political priorities.

Question 6 - Do you think the UK's ability to effectively regulate cross-border provision of services would be better, worse, or broadly the same, as the result of more or less EU action?

38. If there were less or no EU action on cross-border provision of services, in terms of other Member States' access to the UK market, the UK might be able to more effectively regulate such access (within the confines of the global agreements under the WTO obligations by which the UK would remain bound). However, that would only regulate the conditions for access by service providers from other Member States to the UK market.

39. If the EU were to take less action, there would thus be fewer mutually binding rights and obligations in terms of access to provide cross-border services and if the UK wanted such access it might have to enter into bilateral agreements with its main trading partners if it wanted to retain a high level of market access.

40. Therefore, overall, it would seem that the UK's ability to regulate the cross-border provision of services would be reduced with less EU action.

Question 7 - What future challenges/opportunities might we face in the free movement of services and what impact might these have on the national interest? What impact would any future enlargement of the EU have on the free movement of services?

41. The EU, and Internal Market in particular, is constantly changing to adapt to challenges or exploit opportunities with the aim of promoting growth. Trade and investment are vital to ensure economic growth and the collective success or otherwise of these measures will impact accordingly on our national interest. With this in mind the Law Societies believe that the UK government should engage positively and proactively to ensure the continuing success and further development of EU policy in relation to the free movement of services.

42. When examining the issue of whether further action is required, it might be more appropriate in the current context to carry out a thorough post-implementation review before resorting to further legislation. Failure on the part of Member States to implement or enforce directives may be the cause of the problem. In these cases new legislation is unlikely to solve the problem.

43. The Court of Justice of the EU (including General Court) fulfils a key institutional function in ensuring the smooth functioning of the Internal Market and the EU as a whole. In many cases the system works well but it is not wholly without problems. The Societies are also aware that some thought needs to be given to the qualifications and

competency requirements of Advocates General and judges in both the General Court and the Court of Justice in order to make those bodies efficient and practical courts

44. The capacity of the Court of Justice should be improved by the appointment of three new Advocates General in lines with the Lisbon Treaty. However, it may be constrained by the numbers of both judges and Advocates General who are required to deal with an increasing case load as the body of European law grows as and when the EU continues to expand. The Societies take the view that there is already an urgent need for additional judges to tackle the workload of the General Court. This issue would need to be looked at carefully again in the case of further enlargement.[15]

45. Enlargement brings with it a number of challenges, not least because as the EU enlarges it becomes more difficult for Member States to reach agreement. This can prevent the EU introducing enabling provisions which could be beneficial to businesses, for examples because they allow a company to exercise its freedom of establishment.

46. However, enlargement also presents opportunities. The Societies believe that there are significant future opportunities in the Internal Market, in particular in sectors such as services, including law, telecommunication, high-end engineering and energy where the UK is particularly strong.

47. In an extra-EU trade and investment context, this offers the UK the opportunity to take the lead in areas of strength to influence EU standards, regulation and legislation which in turn are likely to hold significant sway in an international context.

48. Enlargement has the potential to further increase the negotiating power of the EU on the global stage. In the context of trade and investment, the growth of the internal market may also contribute to the attractiveness of the EU as a market for inward investment.

49. Future enlargement would also provide the opportunity for UK businesses to provide services more widely and UK consumers might benefit from a more open services market. The Law Societies advocate market opening, both in the context of provision of legal services and in furthering the interests of members' clients.

Question 8 - Is there a case for more EU action to ensure that assessments for proportionality and necessity are more consistently interpreted? [see paragraphs 22 and 27 for more detail]. Or should the competence to assess these remain with Member States, as is the case now?

50. A number of stakeholders have called for more EU action, and notably for more binding guidance from the Commission, on the necessity and proportionality conditions to be met under the Services Directive before a Member State is permitted to continue to apply special national requirements. Such guidance would be welcome at least as an interim measure.

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[15] The statistics for the Luxemburg Courts are available here: http://curia.europa.eu/jcms/jcms/Jo2_7032/ (Court of Justice) ; http://curia.europa.eu/jcms/jcms/Jo2_7041/ (General Court).See also concerned expressed in, for example, House of Lords European Union Committee, 14th Report of Session 2010–11, The Workload of the Court of Justice of the European Union, published 6 April 2011. See particularly appendix 5 page 58. (http://www.publications.parliament.uk/pa/ld201011/ldselect/ldeucom/128/128.pdf)

51. It should also be noted anyone is free to use the courts of the host member state to challenge barriers which they do not consider to have objective justification.

Question 9 - Should decisions affecting the integrity of the Single Market be taken by all Member States and apply equally to all, or do you believe it is possible to take further liberalising action either unilaterally or with a selection of other Member States, whilst maintaining the integrity of the Single Market?

52. As discussed above, one of the main benefits of action being taken at an EU level is that it reduces compliance costs and other burdens which arise from operating in a fragmented market.

53. Further liberalising action taken on a unilateral basis, should a Member State wish to go further than required by EU law in opening up the services market, is and should be allowed so long as it does not interfere with the smooth functioning of the Single Market and complies with EU law. It would, however, be a different question to consider if a group of Member States carried out further liberalisation amongst themselves as that potentially could create an A and B market for services.

54. The Law Societies do not take a view as to whether such action would be likely to be taken or in which services sectors. It would in all circumstances be crucial to ensure that were such initiatives to move forward, they should respect the relevant Treaty provisions, notably the rights and competences of non-participating Member States.

Question 10 - What do you see as the advantages and disadvantages of EU action on the mutual recognition of professional qualifications (MPRQ)? To what extent do you believe that the cost of existing or future European rules in this area is proportionate to the benefits?

55. The Societies support the free movement of lawyers and are in favour of MPRQ in principle.

56. There have been problems with implementation but this is a problem of non-compliance by Member States rather than as a result of the EU taking action in this area.

57. The Societies do not wish to offer a view on how the MPRQ system functions for other professions.

58. The Societies note that the Establishment Directive works well and on balance it has resulted in freedom of movement of UK lawyers to other Member States and contributed to the attraction of the UK for overseas lawyers and law firms.

59. Some legal practitioners in have pointed to the desirability of including notarial services within the framework of the EU legislation with a view to dismantling the anti-competitive regimes and practices that exist in that respect throughout much of the continental EU.

60. The current government has a domestic agenda to reduce regulation as a whole. As a general principle, the Law Societies believes that solicitors should remain on the list of regulated professions. While encouraging the Free Movement of Lawyers, action in this area must ensure a high professional standard for all lawyers practising in the UK, whether qualified here or elsewhere.

Question 11 - What do you see as the advantages and disadvantages of EU action on company law? To what extent do you believe that the cost of existing or future European rules in this area is proportionate to the benefits?

61. EU action on company law and corporate governance primarily seeks to ensure companies' freedom of establishment and ability to provide services cross-border; in an integrated market where companies operate and exist on a multinational basis a certain degree of coordination and common rules will be necessary, for example regarding shareholders' rights, accounting and auditing.

62. However, company law in terms of determining the rules for bringing a business into or out of existence, the different forms of companies and the various regulatory requirements, such as certificates, proof of capabilities and capital requirements, is generally left to Member States. Member States' traditions and choices in the area of company law vary and therefore it is vital that any action taken in this respect complies with the subsidiarity principle. EU action in the sphere of company law should avoid making changes to domestic company law systems, other than where it is required to ensure the smooth functioning of the Internal Market.

63. In circumstances where action is taken in the form of harmonisation in an area where mutual recognition could equally well deliver the stated objective, such a piece of legislation could potentially cause problems. However, the problems would have less to do with the level at which action was taken than the form of action.

64. For instance in the area of insolvency law, the Law Societies believe the Insolvency Regulation has brought significant benefits to business and creditors providing a clear choice of law instrument reducing legal uncertainty and cost around insolvencies with cross-border implications. However, they would not favour harmonisation of substantive insolvency law, as that would potentially bring about significant disadvantages.

65. As regards, for example shareholders' rights, having a level of harmonised rules would appear necessary. Mutual recognition would still leave shareholders and businesses unclear as to which shareholders had which rights and would not be likely to achieve the objective of a single market for businesses and investors.

66. When EU action is mandated, the action taken should respect the principle of proportionality. Great care should be taken to ensure the rules are fit for purpose and do not go beyond what is strictly necessary for the smooth functioning of the Internal Market. In the area of corporate governance, as a general rule the Law Societies advocate the "comply or explain" approach also for EU level corporate governance initiatives. It could be problematic were the EU to move away from this principle, though such a possible development might not be dependent on the level at which decisions are taken but rather wider political considerations. Such political consideration might equally induce policy changes on a domestic level.

67. It is not possible to state to what extent the costs of future initiatives are proportionate to the benefits as that will vary according to each initiative.

68. The Law Societies however support solid and comprehensive cost-benefit analysis of legislative proposals and it would be particularly helpful if there were a greater consultation on Commission proposals to facilitate this analysis. The current consultations are often general and high-level without any follow-up consultation on the legislative proposal itself. Thorough impact assessments for new proposals that "pop up" during the legislative proposal might help to ensure the proportionality of EU measures in this area of law. The quality of the existing Commission impact

assessments could also be improved. One way of achieving this might be to conduct the impact assessment as a first step, based on which a legislative proposal is drafted instead of the current practice of drafting the impact assessment and the proposal simultaneously.

Question 12 - What do you see as the advantages and disadvantages of EU action public procurement? To what extent do you believe that the cost of European rules in this area is proportionate to the benefits? What is your view of the effect on the defence sector?

69. EU public procurement law has opened up procurement markets in the EU. However, cross-border public procurement remains low.

70. One of the key criticisms of EU public procurement rules is that they are costly and difficult to administer for public authorities and businesses alike. This is particularly so in Member States which have national rules in place for public tendering which fall below the EU thresholds as these procedures are seen as significantly lighter to administer.

71. The forthcoming EU legislation, expected to be adopted in January, is likely to bring greater clarity.

72. The defence sector should also benefit from an ending of national protectionism with the recent defence legislation.

Question 13 - Are there any general points you wish to make which are not captured above?

73. The Internal Market is constantly changing to adapt to challenges or exploit opportunities with the aim of promoting growth. The collective success or otherwise of these measures will impact accordingly on our national interest. With this in mind the Law Societies believe that the UK government should engage positively and proactively to ensure the continuing success and further development of the Internal Market.

74. To date the UK has been an important voice in Internal Market negotiations and in influencing the proposals the Commission puts forward. The UK has been particularly successful in areas such as company law and corporate governance: for example, the comply or explain approach to corporate governance has been adopted in the EU.

75. There would be a number of consequences for the UK if access to the Internal Market was not on the basis of EU Membership. At present the UK has a strong position as one of the larger Member States which allows it to participate in and inform negotiations. Involvement in the Internal Market along the same lines as Norway or Switzerland would still require the UK to comply with the vast bulk of EU legislation including those "wider" areas of legislation which the EU considered essential for the functioning of the Internal Market. However, there would be no UK Commissioner in the European Commission and UK citizens would not be able to elect Members of the European Parliament to represent their interests. While it is true that members of the EEA have access to some informal discussions and observer status, their influence cannot approach that of full Member States which participate in all relevant meetings, have representation in the Commission and all the other institutions, vote and exercise a power of veto

Contribution to the Balance of Competences Review of the Internal Market: Free Movement of Services

Fiona Hall MEP, Leader of the Liberal Democrats in the European Parliament, on behalf of the Liberal Democrat MEPs

Submission of Evidence:

1. What do you see as the advantages and disadvantages of EU action on the free movement of services? How might the national interest be served by action being taken at a different level (for example, at the World Trade Organisation level, or at the national level), either in addition to or as an alternative to EU action?

The rationale for EU action on the free movement of services is that it enables the EU single market in services to function properly. The EU single market, the world's biggest single market, enables UK citizens and businesses to buy and sell services without barriers in 28 different Member States (including the UK) with a total population of over 500 million people[1]. In the UK the service sector accounts for around 75% of GDP and the recent return to growth can be put down largely to the service sector. As a service based economy, having preferential access to supply services within the EU single market as underpinned by free movement of services can only be seen as an advantage. Arguably the main disadvantage of EU action on free movement of services is that, when the rules have been laid down in the services directive, they often allow too much flexibility for member states to prevent access to their markets.

If the UK, as an alternative to EU action, were to only take action at another level, such as the WTO, the advantages of being part of the EU's fully integrated single market would be lost. Being part of the EU helps our service industries trade with non-EU countries through free trade agreements with South Korea, Colombia and ultimately the USA. The EU is also participating in plurilateral negotiations on services with other developed economies. Collective clout in these negotiations helps get a better deal for our service industries.

Removing the many barriers to services markets is a lot more difficult than removing barriers for goods. The EU body of legislation relating to the free movement of services, based around the services directive, provides a good framework to remove barriers to access to services in the EU. At the WTO, separate agreements with individual countries including emerging nations would have to be made for specific sectors and are not nearly as extensive as the provisions within the EU services directive. Crucially, there is no central implementation body such as the Commission to enforce these agreements and, instead, problems with implementation can only be resolved through lengthy and costly dispute settlement procedures that are not well suited to the services sector.

Linked to this – it is often the emerging nations that are the most protectionist in services and procurement. It is fanciful to think we can form a free trade block of the Commonwealth when India will simply not liberalise its service industries – only the collective weight of the EU can hold out any hope of opening these markets, not going it alone and trying to prise them open with the offer of a market of 62 million people. The UK already has a solid export base to the EU, in 2011 there were £35 billion of service exports to the EU, compared to India - £1 billion[2]

[1] http://www.bis.gov.uk/policies/europe/eu-single-market-introduction
[2] http://www.ons.gov.uk/ons/dcp171778_301979.pdf

It is hard to imagine that the UK national interest would be better served outside the EU internal market with service provision by UK companies outside the UK based solely on participation in the WTO.

2. To what extent do you think EU action on free movement of services helps or hinders UK businesses?

As the UK economy is largely a service based economy, EU action on free movement of services helps UK business to a large extent. The internal market for services gives UK service providers the possibility to access a market that is far larger than that the UK domestic market. The free movement of services within the European Union as part of the single market not only gives UK businesses open, barrier free access to the largest economy in the world (with a GDP per capita of €25 000 for its 500 million consumers[3]) but also enables UK companies to become globally competitive by enabling them to develop first within the internal market.

3. How well, or otherwise, have the EU's mechanisms for delivering the free movement of services worked?

The EU's mechanisms for delivering the free movement of services are underpinned by the services directive, the internal market information system (IMI) and the mutual recognition of professional qualification (MRPQ) directive. The services directive sets out a framework for service providers to establish in another member state. The full potential of the mechanisms laid down in the services directive are not being reached as not enough service providers are aware of and taking advantage of the provisions. Arguably some member states are not implementing the rules in a way that makes it easier for new service providers to enter the market but this does not necessarily mean the mechanisms and rules themselves need changing and in fact shows that more monitoring of implementation is needed by the European Commission.

The IMI (internal market information) system allows different member state national authorities to communicate with each other when approving new service providers and verifying qualifications this has been revised with the support of the Liberal Democrat European Parliamentary Party and appears to be working well.

The MRPQ (Mutual Recognition of Professional Qualifications) has also recently been revised to improve functioning with support of the Liberal Democrat European Parliamentary Party

4. In your experience do Member States take a consistent approach to implementing and enforcing EU rules, or not?

UK business and consumers have made clear in discussions that a consistent approach is not always taken to implementing and enforcing EU rules. Some of the inconsistencies may be put down to the difference between perception and fact. The UK is often thought in the UK to be the only member state to properly transpose EU law whereas the EU single market scoreboards paint a different picture with the UK having a transposition deficit (the gap between the number of Internal Market laws adopted at EU level and those in force in the Member States) for single market legislation that is larger than the deficit in countries Bulgaria, Lithuania and Latvia[4]. The fact that the free movement of services is based on a directive, not a regulation, means that member states have transposed provisions into their national legislation, and this may also lead to inconsistencies between implementation in different member states.

[3] European Commission, DG Trade, EU Position in world trade: http://ec.europa.eu/trade/policy/eu-position-in-world-trade/

[4] http://ec.europa.eu/internal_market/scoreboard/performance_by_governance_tool/transposition/index_en.htm

In terms of how EU rules are applied in different member states, implementation of EU and national rules is the responsibility of the national authorities. There is a certain amount of flexibility with EU directives for member states to transpose them into national law so the rules may not be exactly the same but should always be consistent. This is similar to the way in which UK national laws may be implemented differently by different local authorities.

Responsibility for the enforcement and uniform application of EU rules lies not with individual member state authorities but with the European Commission in its role as guardian of the treaties as laid down in article 17 of the Treaty on the functioning of the European Union, TFEU [5]. If inconsistencies exist in implementation between member states then the Commission has the power to act and correct this. The Commission prioritises the transposition of directives and the current national transposition measures by member states are published annually by the Commission in the form of monitoring reports.

5. What future challenges/opportunities might we face in the free movement of services and what impact might these have on the national interest? What impact would any future enlargement of the EU have on the free movement of services?

A future opportunity is the digital single market which stands to benefit UK businesses and consumers. Any future enlargement of the EU could only have a positive impact on the EU in terms of the freedom of movement of services as UK businesses and consumers would have access to an even larger market. EU membership would also increase the reliability of new member states trading partners as the adhere to EU law which would mean that governance standards are increased, more reliable business climates are created and better legal systems for redress are put in place.

6. Is there a case for more EU action to ensure that assessments for proportionality and necessity are more consistently interpreted? [see paragraphs 22 and 27 for more detail]. Or should the competence to assess these remain with Member States, as is the case now?

The fact that member states can currently undermine any liberalisation of the EU single market in services by temporarily restricting the freedom to provide services clearly makes the case for more EU action. The competence to assess the necessity and proportionality should be done at an EU level and not by individual member states to ensure more consistent interpretation.

7. Should decisions affecting the integrity of the Single Market be taken by all Member States and apply equally to all, or do you believe it is possible to take further liberalising action either unilaterally or with a selection of other Member States, whilst maintaining the integrity of the Single Market?

As a general rule, decisions affecting the integrity of the single market should be taken by all and apply to all to avoid further inconsistencies. It is difficult to see how the integrity of the single market could be maintained if a selection of member states further liberalise their markets creating a single market within the single market.

However, there have been precedents in other areas of single market legislation such as the unitary patent where the use of enhanced cooperation has been necessary and successful. Such steps

[5] Article 17: Treaty on the functioning of the EU: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12012E/TXT:EN:PDF#page=9

towards integration between a 'coalition of the willing' should be exceptional and ensure that a substantial majority of member states participate, but should be a tool available to policymakers where single market integration is held up by a handful of countries.

8. What do you see as the advantages and disadvantages of EU action on the mutual recognition of professional qualifications (MRPQ)? To what extent do you believe that the cost of existing or future European rules in this area is proportionate to the benefits?

The advantages are that it is easier for qualified people to move around the EU on the one hand and for public authorities to be able to verify different qualifications via the IMI system. The UK can benefit from qualified professionals coming to work in the UK in sectors where there are shortages such as specialist doctors.

The disadvantages are the lack of harmonised qualifications as mutual recognition doesn't deal with issues surrounding different types of qualification but this is an issue that can occur nationally with different universities offering different courses that lead to the same qualification.

9. What do you see as the advantages and disadvantages of EU action on public procurement? To what extent do you believe that the cost of European rules in this area is proportionate to the benefits? What is your view of the effect on the defence sector?

EU action on public procurement offers the advantage of giving better value for money to the tax payer as public authorities can have a larger market in which to put out their calls for tender , leading to greater choice. UK businesses can also benefit by being able to bid for tenders across the single market. The relevant thresholds make EU legislation proportionate.

In talks with stakeholder it seems that although there are specific EU rules in place on defence procurement they are not working properly as member states use exemptions. The defence procurement is not just about weapons but also about uniforms for soldiers and on such items both public authorities and businesses would benefit from more EU action.

Balance of EU competences review: LGA response
September 2013

Local Government Association

Submission

SUMMARY

1. The Local Government Association (LGA) is the voice of English local government. Our mission is to help support, promote and improve local authorities in England.

2. Given the broad range of EU competences affecting local government, the LGA is submitting a single response to the Government's Balance of EU Competences Review rather than respond to each specific consultation. Our response covers the role of local authorities, principles of subsidiarity, good governance and better regulation in EU legislation and its implementation, which are relevant to all policy fields.

INTRODUCTION

3. We understand that the Review aims to develop an audit of what the EU does and how it affects the UK on 32 specific policy topics. Members of the LGA European and International Board discussed the Review with a Foreign Office official in July 2013. Our members expressed reservations about the organisation of the review, which they considered to be protracted and over-complex. Overall, they felt that the local dimension was missing from the Review, and that the "call for evidence" may not distinguish between objective, fact-based evidence on the one hand, and anecdotal, politically-motivated commentary on the other.

4. The LGA is responding to this review for three reasons:

   i. the Review covers many areas where local authorities have a duty to provide services, enforce regulations, and/or inform the general public. We estimate that around half of all new UK laws affecting the sector have their origins in EU law. Once transposed, they may have financial, administrative and regulatory implications;

   ii. the 2011 Localism Act EU Financial Sanctions provision requires a significant shift in the way that the Government considers how new EU legislation could affect local councils in terms of new obligations and burdens; and

   iii. more needs to be done to ensure the process of negotiating, transposing and implementing EU laws is effective. We recommend practical steps are taken to achieve this within the UK and in Brussels.

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THE ROLE OF THE LGA

5. The LGA is a cross-party organisation and does not take a view on the future UK role and relationship with the EU. Our role is to assess the impact and practicability of specific EU legislative proposals and policy initiatives on a case-by-case basis. The earlier local authorities can influence the process, and the more involved they are with the Government in doing that, the more effective new laws are likely to be. Our aim is to ensure that EU legislation is proportionate and fit for purpose, in that it delivers its intended benefits without imposing undue financial, administrative and regulatory burdens on our member authorities. We are concerned that in recent years, local authorities have had to deliver many new EU obligations at a time of severe budgetary constraint.

6. We want to ensure that our member authorities benefit from EU funding and other opportunities that can be accessed through our EU membership, and that exchange of experience and good practice is promoted. Working through institutions such as the EU Committee of the Regions (CoR) and the Council of European Municipalities and Regions (the pan-European LGA) can be an effective way of ensuring that the interests of English local government are pursued.

IMPACT OF EU RULES ON LOCAL AUTHORITIES IN ENGLAND

Wide-ranging impact of EU obligations on local authorities

7. Local authorities have a broad range of functions. Many of these are affected by EU laws, with which they comply through UK Statutory Instruments which transpose EU Directives, or through EU Regulations which have 'direct effect'. These can have a significant, administrative, financial and regulatory impact on the way in which local authorities are run, and the services that they provide or procure, costing time and money to implement.

8. We estimate that around half of all new UK laws affecting the sector have their origins in EU law. Broadly, the areas of EU legislation and policy that we prioritise include promoting jobs and growth via EU funds; regulation of public services and procurement; state aid rules; environment, waste and energy; employment law; equalities and social policy; good governance and local democracy.

9. Once transposed, EU law impacts local authorities through:
    a. energy efficiency and consumption rules affecting municipal buildings, housing stock and public transport;
    b. landfill, waste framework, waste electrical and electronic equipment, and air quality rules framing all local environmental and waste management services;
    c. the renewable energy directive setting ambitious targets for energy generation and in the transport sector;
    d. internal market laws on public procurement framing the way in which local authorities buy goods, works and services; and laws on licensing affecting their regulatory activities;

e. state aid rules affecting how new businesses, public transport, and airports can be supported with public finance;
f. new EU rules affecting the activities of local authority registrars – EU birth, death, and marriage certificates;
g. working time and health and safety rules affecting shift patterns in Fire and Rescue Authorities and residential care homes; other EU employment laws stipulate parental leave entitlements and rules on the employment of temporary workers;
h. wide ranging consumer policy laws are regulated by local authority trading standards officers;
i. regulation of businesses, often delivered through local trading standards, environmental health and licensing services;
j. rules on the free movement of people and labour can affect local communities and local economies in many ways, with the consequence that local services may need to be adapted;
k. EU cohesion policy defines how much funding is available to create growth and jobs in local communities; and
l. rules to make it easier for the service and retail sector to operate across the EU impact on council licensing functions.

10. The impact of these laws may be positive or negative, and the burdens imposed may be negligible or substantial, proportionate or disproportionate to the objectives being pursued. The magnitude of the burden may be affected by the way in which the EU law is transposed into UK law ('goldplating'). In some cases, the EU provides funding to assist local authorities to meet their obligations.

Transposition issues

11. The Localism Act EU Financial Sanctions provisions enable a Minister to seek to pass on to a local authority a fine from the EU for tacitly failing to comply with an EU obligation, if the Government can prove that the local authority contributed to UK non-compliance. This significantly changes the relationship between central and local government on EU legislative matters.

12. The Government assumes that all local authorities know if a UK Statutory Instrument implements an EU Directive, and should therefore be aware if they are potentially liable to an EU financial sanction. The reality though is not that clear cut. This is because the Government has not always made explicit in domestic legislation that it is wholly, or in part, transposing an EU law. This practice, if continued for future EU legislation, will have a significant impact in enforcing the Localism Act EU financial sanctions provisions.

Case study: Air Quality
The Government transposed its responsibilities under the EU Ambient Air Quality Directive through the UK Air Quality Standards Regulations. It is entirely separate to, and has no read across with, UK legislation setting out local authorities' air quality management role through the Environment Act and Air Quality Regulations, neither of which makes clear that they result from an EU law, or that failure to comply could potentially result in an EU fine being passed on by the Government.

13. It can take years for EU laws to be agreed, transposed and implemented. Often these decisions are made without a thorough assessment by the Government on how these rules will be implemented. At times the concerns of local government are inadequately addressed, which may result in unforeseen financial and administrative burdens on local authorities.

Case study: EU public procurement Directive
When it came to agreeing the 2004 EU public procurement Directive, the Government predicted that the new rules would not add new costs or administrative burdens to the public sector or business, and that 'any costs in the procurement process should be reduced by these simplified and improved rules'. In practice, there have been a number of different cost and administrative burdens on local authorities. These include needing to seek legal advice on certain types of contractual relations, and having to spend time dealing with the threat of legal challenges. Typically procurement officers spend more time on legal issues, whilst failed bidders seek disclosure of all information to the contract award, and seek to challenge it. A 2010 LGA survey revealed that 66% of local authority procurement managers felt the Directive brought increased procurement process costs and administrative burdens, creating a more complex procurement process.

14. Recent changes to be agreed by the end of 2013 will help local authorities allowing faster award procedures, greater local authority collaboration, and an ability to stipulate environmental and social conditions. They are required to fully adopt e-procurement within 30 months following the introduction of the Directive.

15. Unclear and poorly drafted reinterpretation of directives into domestic regulations can lead to uncertainty and significant additional cost.

Case study: Waste Framework Directive
One example is the experience of DEFRA and the Welsh Government who, following a costly and time-consuming legal challenge, recognised that the domestic regulations as drafted did not adequately reflect the requirements of the Waste Framework Directive and should be amended. DEFRA and the Welsh Government have now replicated the requirements of the Directive into domestic regulations. The officer resource and wider litigation costs incurred by both the Department and the Welsh Government could have been avoided by taking this clearer approach at the outset of proceedings.

Reducing the burden of EU law on local authorities

16. Despite English local authorities being subject to an array of EU obligations, little is done by the Government to adequately involve them in assessing the impact of these laws before they are agreed or transposed, which creates unnecessary burdens.

Case study: Energy Performance of Buildings Directive
Reducing energy consumption is a significant EU, national and local authority priority. However, the original Energy Performance of Buildings Directive and its implementation have added administrative and financial burdens to local authorities. The Directive sets minimum energy standards for new and existing buildings undergoing major renovation, but implementation in England focused on process, rather than outcomes. The Directive recommended that all public buildings be assessed and display an energy certificate (DEC) no more than ten years old, highlighting energy consumption. DCLG however set out that DECs be renewed *annually*. This cost fell to local authorities, increasing implementation costs for English local authorities compared to EU counterparts.

17. EU legislation sometimes impinges on the ability to make local decisions about how services are fundamentally designed and delivered. For example, the EU Services Directive contains many positive initiatives but it also place limits on how licensing services can operate and the fees that can be charged. On-going discussions relating to EU food legislation suggest councils may be required to charge for some services. This would restrict the ability for councils to design services based on local needs and priorities.

Success stories

18. There are instances where the Government has engaged effectively with local authorities on EU legislation, but these are the exception rather than the rule. Key to this has been early engagement before a UK policy line is developed, enabling local authorities to help give an evidence base to UK policy positions.

Case study: Energy Efficiency Directive
The draft Directive proposed to apply a binding annual 3% renovation target to local government buildings. While the policy intentions of the EU were supported by local government, it would have been financially impossible for councils to achieve this without diverting significant resources from key services, at a time of unprecedented budgetary constraint. Working with the Government and other local governments across the EU to identify the potential impact of the EU target, we were able to successfully remove local government from the scope of the Directive. Moreover, from a UK perspective these targets were unnecessary since a number of national initiatives (Carbon Reduction Commitment, Green Deal, and other local measures) already steer English local authorities to achieve energy efficiency improvements in their building stock.

Case study: Directive promoting renewable energy sources
The Renewable Energy Directive set the UK a target to increase alternative energy usage to 15% by 2020. Through the CoR, the LGA successfully campaigned for the Directive to recognise local authorities' role in decentralised, alternative energy generation, and the positive impact it could have on local green job creation, secure energy sources, and more local control on future supplies. It enabled local areas to press ahead with renewable energy, without adding complexity to local planning regulations. Only by working closely with the Government from the outset was local government able to influence the outcome in Brussels and Westminster.

CONCLUSIONS AND RECOMMENDATIONS

19. Our experiences have led us to the conclusion that the decision making process in agreeing EU laws and transposing them into UK law, and their implementation, could be more effective.

20. Given the breadth of EU obligations affecting local authorities and the introduction of the Localism Act, the LGA has repeatedly called for a more robust, closer and structured involvement from the outset with Government Departments on EU issues involving the sector. For us, it is imperative that Ministers have an appreciation of the impact of specific targets and deadlines in proposed EU laws, and of local authorities' ability to deliver them.

21. While the Localism Act led to a Government commitment towards a more systematic approach to gather intelligence and evidence on the local implications of EU laws, it remains to be seen how effective and systematic this will be.

22. The LGA has initiated a series of activities to promote better partnership working. Principles of sharing relevant information, working together in compiling a shared evidence base to further our mutual priorities and to ensure maximum influence on shared priorities are key outcomes that we would like to achieve. We anticipate a number of EU reviews on existing Directives, including working time, and seek assurance from the Government that it will examine the implications on local public services (Fire and Rescue Authorities and residential care homes), so that future pressures are mitigated.

23. The LGA frequently lobbies the Government (in Whitehall and Brussels), the European Commission and Parliament to promote the principles underlying these recommendations through the EU smart regulation strategy, and by applying these principles to specific directives. The LGA has good working relationships in Brussels with UK civil servants (UKREP) for intelligence-gathering and influence.

24. ***Rewiring Public Services***, a new LGA campaign proposes ten significant changes between local and central Government in order to transform public services. The initiative contains two important elements which are relevant to this consultation and which are reflected in our recommendations. The first is to address the 'English question' relating to devolution. Our model reduces bureaucracy and red tape by streamlining services and devolving to the local level, resulting in a slim core for central government of England. The second is to ensure that the principle purpose of regulation is to enable the delivery of economic growth aligned to local vision. Our recommendations are presented in the light of these benchmarks.

Recommendations relevant to the Government

25. **Identifying challenges early**. As the sole UK negotiator for EU laws affecting English local authorities, the Government has an important role in securing the best possible outcome for UK taxpayers. This should require a thorough examination by the Government in partnership with the LGA and its member authorities to analyse challenges and opportunities in delivering and/or implementing measures at local authority level and ensuring it is costed. It must engage with the LGA at two crucial stages: firstly: whilst negotiating the UK's line on a draft EU law which could affect local services; and secondly: when UK Parliament transposes an EU directive into UK law (see public procurement example).

26. **Systematic, high level engagement is needed**. Scotland, Wales and Northern Ireland have a constitutional right to be consulted and influence UK national policy, including on EU legislation, and to participate in Council meetings in Brussels. There is no equivalent influence or representation for England. This absence was most notable when decisions were made to re-allocate part of England's EU funding allocation to the Devolved Administrations. It is our view, as set out in *Rewiring Public Services*, that in most cases this would best be done by consulting local government through the LGA.

27. **Avoiding goldplating**. There is a risk that the original purpose of legislation may be lost by over-zealous legal interpretation or reinforcement, losing sight of the original intention to enable or safeguard appropriate rights and responsibilities. The LGA therefore urges the UK Government to apply new EU rules in the lightest possible way and avoid 'goldplating' (see energy performance of buildings example). In recent years, English local authorities have had to implement new EU obligations at a time when they have had to absorb cumulative reductions in their budgets. The Government has outlined its commitment to protect businesses from goldplating EU legislation by using direct 'copy out'[1]. The same commitment should apply to local authorities, in particular given their new exposure to potential EU fines at a time when their capacity to deliver has been reduced.

[1] https://www.gov.uk/government/news/government-ends-goldplating-of-european-regulations

28. **Effective transposition**. In line with the above, the Government should identify more explicitly the link between EU obligations and UK Statutory Instruments (see air quality example), so that there is clarity where and how domestic law responds to EU obligations and statutory requirements. This could be done by stating on the face of a UK Statutory Instrument which EU law it fully, or in part, transposes, and any EU targets and deadlines it incorporates and which may in consequence expose the local authority to a potential EU fine.

29. **Effective communication**. The Government could use the www.gov.uk website more effectively to house in one place all information relevant to a Directive and its implementation. An annual list of EU legislation affecting local government could be published to ensure that all parties understand the origin of new obligations. This should be in addition to systematic, timely and co-ordinated communication, which is critical if local authorities are to apply rules in a timely manner and thus avoid the UK being in breach of EU law.

Recommendations for EU decision-makers

30. **Only legislate when necessary**. We acknowledge that 'good governance' is not 'no governance'. In some policy areas it is logical that EU countries collaborate to set a level playing field. However, the EU should legislate only when absolutely necessary and with a minimum of bureaucratic rules and a maximum of consultation, forewarning and financial assistance, leaving it to local authorities and the UK Government to work out the detail. This addresses the issue of 'subsidiarity'.

31. **Light-touch EU legislation**. We recommend 'light touch' EU legislation where appropriate, in which the legislative purpose is clearly articulated, and that it should be for the Government, in consultation with local authorities and the LGA, to work out the detail of how we achieve EU objectives. This addresses the issue of 'proportionality'.

32. **Alternatives to legislation**. The EU should consider alternatives to legislation, and introduce time limits and review periods ('sunset clauses'), to accelerate the repeal and simplification of existing rules (the concept of 'one-in, one-out').

33. **Strengthen democratic legitimacy**. EU decision-makers must better involve local authorities - through the LGA, European associations and local government representatives in the CoR - to strengthen the democratic legitimacy of EU decisions and ensure that all new EU laws are necessary, proportionate and workable.

34. **Effective EU wide enforcement of rules**. Where EU laws are in place, there must be more effective enforcement of rules across Member States. We note that the UK assiduously implements its EU obligations, while others take a less robust approach to compliance.

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LONDON of CHAMBER
COMMERCE AND INDUSTRY

Written evidence submitted by London Chamber of Commerce and Industry

London Chamber Of Commerce & Industry Response to: Department for Business Innovation & Skills Call for Evidence: Single Market – Free Movement of Services Review

13 January 2014

Executive Summary

1. The UK has a comparative advantage in the export of services, in particular financial and business services concentrated in London. London businesses view the European single market as an integral benefit of EU membership. It enables UK companies to reach a much larger pool of customers, partners, suppliers and labour, effectively making EU countries an extension of the domestic market. Any limitations to UK businesses looking to operate within the single market would negatively impact growth and deter firms looking to start exporting.

2. However, there is a clear view from London businesses that the process of building a true single market is still not complete, with barriers such as inconsistencies in the way regulations are implemented remaining in a number of sectors, particularly services. The UK Government must relentlessly drive efforts to advance single market harmonisation to ensure a level playing field across Europe.

Introduction

3. London Chamber of Commerce & Industry (LCCI) is the capital's largest and most representative business organisation with over 2,500 member companies from across Greater London. LCCI membership ranges from small and medium enterprises through to multi-national corporates. LCCI member companies operate within a mix of sectors, across the 33 London boroughs, genuinely reflecting the broad London business spectrum.

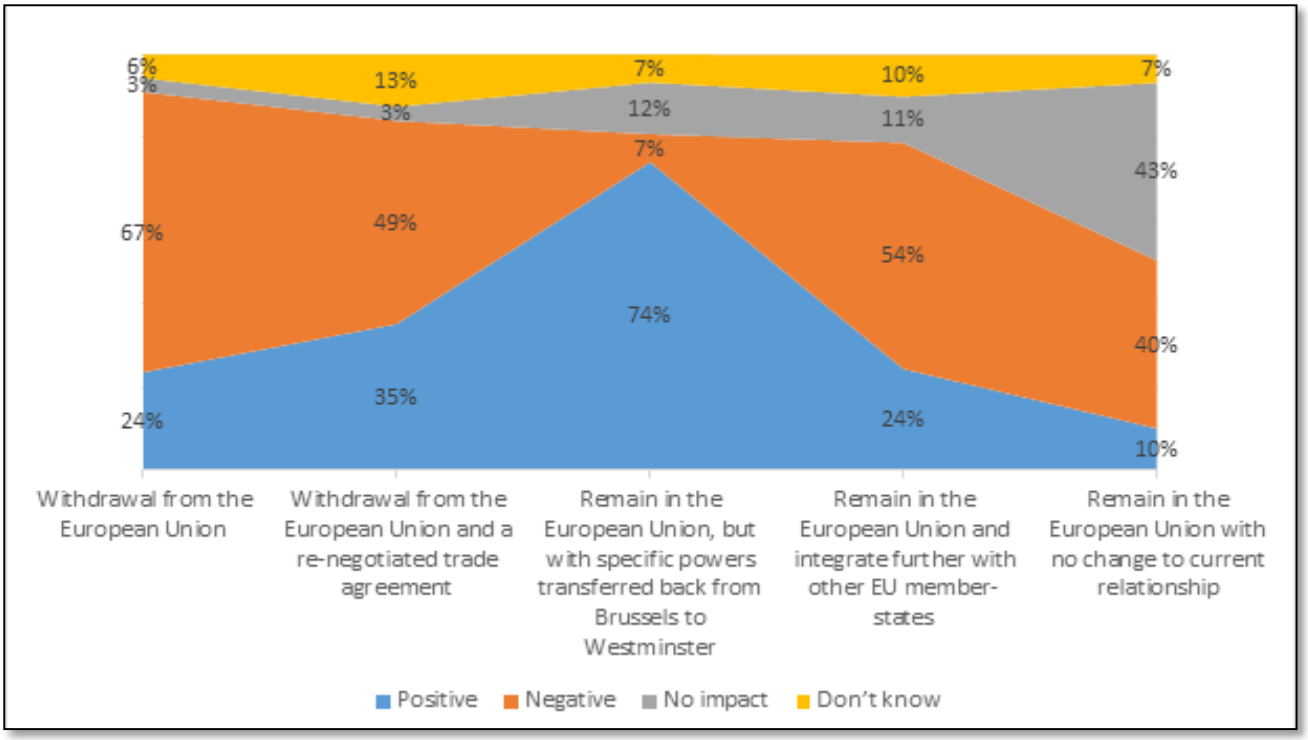
4. As the voice of London business we seek to promote and enhance the interests of the London business community, through representations to the Mayor and the GLA, central Government, Parliament and the media as well as relevant international audiences. We regularly commission member surveys and detailed research to inform and shape the debate on key business issues.

What do you see as the advantages and disadvantages of EU action on the free movement of services? How might the national interest be served by action being taken at a different level (for example, at the World Trade Organisation level, or at the national level), either in addition to or as an alternative to EU action?

5. The UK has a comparative advantage in the export of services. London in particular is highly specialised in the financial and business services sector, and the EU is the largest single export market for UK financial services, generating 38 per cent of the UK's total trade surplus in financial services in 2011. Consequently, the free movement of services is vital for London businesses, particularly those trading or seeking to trade internationally and to contribute to export-led growth.

6. According to LCCI's latest quarterly EU barometer survey, 74 per cent of London businesses thought remaining within the EU, but with certain powers transferred back to the UK, would have a positive effect on businesses and the economy (only seven per cent believed it would have a negative effect), making it their preferred option for the UK's engagement with the EU. On the other hand, withdrawal from the EU was the least desired of all options, as 67 per cent of London businesses believed it would have a negative impact businesses and the economy (see Figure 1).[1]

Figure 1: London business' opinion on the impact of different relationships with the EU on the UK's firms and economic prospects



7. There is an appetite among London business to see certain powers, such as employment law, transferred from Brussels to Westminster[2]; however, LCCI believes that competences related to the free movement of services are best regulated at the EU level, as further harmonisation would ensure a level playing field for countries across Europe.

[1] November 2013 LCCI survey of 145 London businesses. The EU Barometer survey has been conducted quarterly since March 2013. In comparison to March 2013, the latest results show that the negative impact of withdrawal has increased by eight per cent, while the positive impact of remaining in the EU with powers transferred back to Brussels has increased by 15 per cent.

[2] For more information please see LCCI (2013): *Help or hindrance? The value of EU membership to London business*, at www.londonchamber.co.uk/research/EUreport

To what extent do you think EU action on the free movement of services helps or hinders UK businesses?

8. EU harmonisation of regulations enabling the free movement of services allows British businesses to export their services unhindered by national regulation. This is a great advantage of EU membership; however, while services represent 70 per cent of EU GDP, they constitute only 24 per cent of EU trade. The single market has been growing only gradually, with the single market principles of fair access and competition still to be extended to sectors like energy, services, telecommunications and transport. This holds much as yet untapped potential, and the harmonisation of these sectors would hugely benefit UK companies with expertise in these areas.

9. Were the services sectors further liberalised, the UK – which has a competitive advantage in the provision of services – would stand to gain more than countries like Germany and France – where manufacturing represents a higher proportion of GDP than in the UK. A 2011 BIS paper found that the complete elimination of all remaining barriers to trade inside the EU over a period of ten years could generate national income gains of around seven per cent of UK GDP.[3]

10. For these potential gains to the UK to materialise, the UK must maintain an active involvement in the EU and help driving efforts to advance single market harmonisation. Since the 2008 economic crisis the European Commission has adopted two Single Market Acts (IP/11/469 and IP/12/1054), with provisions amongst others to: facilitate the definition of European services standards, make electronic payment services more efficient and ensure the pan-European operation of electronic identification and signatures, and open up domestic rail passenger services to competition from operators from other member states.[4] The EU's wider growth strategy for the coming decade, *Europe2020*, also contains a number of provisions in these areas.[5] It is crucial that the UK participates in these harmonisation measures within the single market for services, as they would increase economic benefits for the UK.

To what extend has the free movement of services brought additional costs and/or benefits when trading with countries inside and outside the EU?

11. Despite the fast economic growth of emerging markets, the EU is still the UK's main trading partner, with the EU countries comprising around 51 per cent of the UK's total trade in goods and services, in comparison to 5.7 per cent with China and 1.5 per cent with India.[6] In 2012 the UK exported more than £150 billion worth of goods and services to EU countries and imported over £200 billion. Exports have been growing at an average rate of 2.65 per cent annually, with imports annual average growth rate being over 4 per cent.[7]

12. For companies in London the balance of trade is tipped slightly towards countries outside the EU, but the latter still forms a significant proportion: in 2012 London had £19.5 billion worth of exports to the EU compared to £20.5 billion outside the EU; and £26.3 billion worth of imports from the EU compared to £49 billion from outside the EU.[8]

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[3] Department for Business, Innovation and Skills (2011): *The economic consequences for the UK and the EU of completing the Single Market*, BIS Economics Paper No. 11, p. 23

[4] http://europa.eu/rapid/press-release_MEMO-11-239_en.htm?locale=en; http://europa.eu/rapid/press-release_MEMO-12-734_en.htm?locale=en, http://ec.europa.eu/internal_market/top_layer/services/index_en.htm

[5] http://ec.europa.eu/europe2020/europe-2020-in-a-nutshell/flagship-initiatives/index_en.htm

[6] Total UK trade (imports and exports) in 2012 was £702.9 billion, of which EU trade was £356.9 billion and non-EU trade was £346 billion, trade with China was £39.9 billion and with India £10.5 billion. HM Revenue and Customs (2013): *Summary of Import and Export Trade with EU and Non-EU Countries - Annual 2004 – 2012*, at https://www.uktradeinfo.com/Statistics/NonEUOverseasTrade/Documents/Webtables_2012.XLS

[7] Ibid.

[8] HM Revenue and Customs (2013): *UK Regional Trade Statistics Release, Quarter 3 2013*, at https://www.uktradeinfo.com/Statistics/RTS/RTS%20Releases/RTSQ3%202013.xls

13. Given the geographical proximity and the existence of a free trade area, the EU's attractiveness as an exports destination is not surprising. LCCI's latest annual international trade survey found that 72 per cent of London's current exporters trade with EU member states, and 84 per cent of those looking to begin exporting are targeting the EU, followed by the rest of Europe (59 per cent).[9]

14. It is therefore important that any planned renegotiation of the UK's EU membership takes into account how UK business interacts with those in other EU member states. The maintenance of UK business access to the single market should be prioritised in any renegotiation activity.

How well, or otherwise, have the EU's mechanisms for delivering the free movement of services worked?

15. The Services Directive (2006) has had an overall positive impact on delivering the free movement of services and London businesses believe that no further regulation or legislation in this area is necessary.

16. This said, problems have arisen regarding the uniformity of enforcement of the Directive across the EU. London businesses support the Commission's activity on zero tolerance to implementation but believe that more needs to be taken in this area. The UK is one of the countries adhering to the EU regulation most closely but the fact that other EU countries do not, and are protecting key industries, is having a damaging effect on the competitiveness of London business.

17. The deadline for transposition of the Services Directive was 2009, but four years on the majority of Member States have not fully or correctly implemented it. This means that London businesses are facing unfair barriers to trading in Europe as a result of double standards requirement, economic tests requirements, legal form requirements, discrimination from digital downloads and price restrictions; in other words, businesses are facing excessive administration, red-tape and costs.

18. There is a need for greater analysis of the impact the incorrect and incomplete implementation of the Services Directive is having on Member States, in terms of jobs, contracts, and potential revenue lost. A stronger stance must be taken against those Member States that continue to enforce unfair levels of protectionism and greater penalties must be applied to those Members that do not adhere to EU regulation once the transposition period has expired.

In your experience do Member States take a consistent approach to implementing and enforcing EU rules, or not?

19. While LCCI supports the Commission's activity on zero-tolerance towards non-implementation, many LCCI members have expressed concern that fellow EU member states do not take a consistent approach to implementing and enforcing EU rules. Many believe that with the UK enforces EU regulation most stringently than other member states, putting UK businesses at a distinct disadvantage compared to foreign rivals.

20. In terms of implementation, EU Directives allows member states flexibility in the specific means of adopting harmonisation during transposition into national. In some cases, the UK Government has used this flexibility to limit the impact of regulations on businesses through exceptions and opt-outs. For example, it adopted the 'Swedish derogation' on the Agency Workers Directive and allowed some types of businesses to opt out of the Working Time Directive. In other cases, however, the UK has

[9] May 2013 LCCI international trade survey of 164 London businesses. For more information please see LCCI (2013): *Exporting Britain: trading our way back to growth*, at www.londonchamber.co.uk/research/ExportingBritain

implemented EU Directives beyond the minimum necessary to comply with them, a practice known as 'gold-plating'.

21. Some 'gold-plating' may result from the differences between the English and continental judicial systems, as additional provisions need to be included to avoid ambiguities on how the regulation applies in different circumstances. Yet, businesses see gold-plating as placing an additional and unnecessary burden, putting them at a disadvantage to their European competitors. LCCI was encouraged by the commitment to end 'gold-plating' in the Coalition Agreement, and welcome the statement made by the Business Minister in April 2013 that 'gold-plating' had "effectively stopped".[10]

22. The variable enforcement of EU regulations also skews the level playing field for businesses across the EU and makes it difficult to achieve a true single market in services. A LCCI member company in the telecommunications sector highlighted that national regulators in some other member states, such as the southern and eastern countries as well as Germany and Belgium, unduly use flexibility in the EU measures to obfuscate and delay the open competition process. This means that UK-based operators doing business across the EU are placed at a comparative disadvantage to other European operators, who gain fair access in the UK but there is no reciprocal access in their home markets.

Do you think the UK's ability to effectively regulate cross-border provision of services would be better, worse, or broadly the same, as a result or more or less EU action?

23. Uneven enforcement of EU regulations across member states can affect jobs, growth, and competitiveness for UK businesses. The European Commission needs to be more active in effectively overseeing the consistent implementation and enforcement of EU regulations across all member states to secure equal access for companies across the EU. The regulation by the UK of the cross-border provision of services would be much improved as Commission activism will create that much needed level playing field.

What future challenges/opportunities might be faced in the free movement of services and what impact might these have on the national interest? What impact would any future enlargement of the EU have on the free movement of services?

24. There are a number of EU regulatory areas that businesses find problematic because they limit the UK's ability to compete globally. The EU's drive to strengthen regulation of the financial services in the aftermath of the financial crisis, for example, has led to some legislative proposals that are particularly damaging for London's financial services industry. To compensate for some of the public investment during the financial crisis, in September 2011 the European Commission proposed a financial transaction tax (FTT) of 0.1 per cent on trading of stocks and bonds and of 0.01 per cent for derivatives contracts. The tax would apply if any party to the transaction in euros is based in a participating member state, regardless of where the transaction takes place. This would affect London disproportionally as it is a major hub for euro trading. It would not only affect the financial services sector but also many companies in supporting industries that rely on it.

25. The FTT was finally approved under enhanced cooperation rules by only 11 Eurozone states (Austria, Belgium, Estonia, France, Germany, Greece, Italy, Portugal, Slovakia, Slovenia and Spain).[11] Although this might encourage some trade to move from the FTT-affected countries to the UK and others outside it, there may be corresponding reduction in transactions between the UK and FTT states. In addition,

[10] BBC News Online (April, 2013) http://www.bbc.co.uk/news/uk-politics-22277927
[11] Taxation and customs union website, at http://ec.europa.eu/taxation_customs/taxation/other_taxes/financial_sector/index_en.htm

FTT could increase the cost of capital for businesses and governments in non-participating EU member states and, in turn, the cost of investment.[12]

26. This is important to the UK because the financial services sector and related professional services make an enormous contribution to the whole of the UK's economy, amounting to £63 billion (more than 12 per cent of the UK total) and £60 billion respectively paid to the Exchequer a year.[13] The financial services sector is also by far the UK's biggest net exporter, generating a £47 billion trade surplus in 2011, with 38 per cent of this export due to the EU market.[14]

Is there a case for more EU action to ensure that assessments for proportionality and necessity are more consistently interpreted? Or should the competence to assess these remain with Member States, as is the case now?

27. No comment

Should decisions affecting the integrity of the Single Market be taken by all Member States and apply equally to all, or do you believe it is possible to take further liberalizing action either unilaterally or with a selection of other Member States, whilst maintaining the integrity of the Single Market?

28. The key benefit of UK membership of the EU is access to the Single Market. A loss of integrity of the Single Market would result in the disadvantages of membership to business significantly outweighing the benefits. Decisions affecting the integrity of the Single Market should be taken by all Member States and must apply equally to all for business to receive the full benefits of Single Market access. A twin track approach to liberalisation will increase business transaction costs and lead to confusion. Simplicity is key to the success of business operations in the Single Market and regulation that differs across the Eurozone creates additional and unnecessary complexity.

What do you see as the advantages and disadvantages of EU action on the mutual recognition of professional qualifications (MRPQ)? To what extent do you believe that the cost of existing or future European rules in this area is proportionate to the benefits?

29. The MRPQ facilitates the free movement of labour within the EU. This has significant benefits to London businesses, as EU workers play an important role in filling skills gaps within the UK workforce in a number of key economic sectors, such as construction, hospitality and tourism. A recent LCCI report found that the short supply of domestic candidates with the required skills or experience is the main reason London businesses employ EU workers. In addition, 35 per cent of London companies employ EU migrants because of their language skills and/or because they want to develop markets outside the UK, so EU workers' knowledge of markets and populations of their mother countries can help expand overseas business contacts and trade links, enabling businesses to take advantage of overseas growth opportunities.[15] Protecting the EU free movement of workers is therefore vital to enabling London businesses to take full advantage of the improved single market for services.

[12] London Economics (2013): *The Impact of a Financial Transaction Tax on Corporate and Sovereign Debt*, Report for the International Regulatory Strategy Group, City of London Corporation and TheCityUK
[13] Oxford Economics (2012): *The Contribution of Financial and Professional Business Services to the City of London, Greater London and UK Economies*, City of London
[14] TheCityUK (2013): *Key Facts about UK Financial and Professional Services*, p. 12
[15] For more information please see LCCI (2013): *Let them come? EU migration and London's economy*, at www.londonchamber.co.uk/research/EUmigration

What do you see as the advantages and disadvantages of EU action on company law? To what extent do you believe that the cost of existing or future European rules in this area is proportionate to the benefits?

30. No comment

What do you see as the advantages and disadvantages of EU action on public procurement? To what extent do you believe that the cost of existing or future European rules in this area is proportionate to the benefits? What is your view on the effect of the defence sector?

31. London businesses feel that some EU member states implement EU public procurement rules in such a way as to create a more favourable outcome for domestic companies whilst sticking to the law. Although officials cannot discriminate on the basis of national origin, award criteria may be devised in such a way as to give local firms a better chance of winning, for example by basing them on a county's growth and industrial strategy or breaking up large public contracts into smaller specialist contracts, building sub-contracting opportunities for businesses in the region.

32. At the moment, it is difficult to know whether the fault for poor procurement outcomes lies with the EU Directives themselves or with UK Government guidance. Therefore, 18 per cent of London businesses believe that public procurement competence should be transferred from the EU to national governments. Some LCCI members suggested that doing so would clarify where accountability with public procurement lies and would encourage the UK government to ensure the quality of public contracts and limit unnecessary costs being borne by bidders and by the procuring authorities alike.

Are there any general points you wish to make that are not captured above?

33. No further comments.

Dear Sir or Madam,

I write as the immediate past Minister for Defence Equipment, Support and Technology to offer my views on the EU's role in defence procurement in relation to the review of the single market and services.

I am clear that the European Union should not acquire a defence identity as such. Our national defence requirements should continue to be met through NATO, through strategic alliances with countries that share common ambitions and understandings, through occasional "coalitions of the willing" and, where necessary, through unilateral action. The creation of new mechanisms or structures would be a costly diversion and add nothing to national security.

There will remain a wide range of defence equipment and services that will need to be met exclusively by United Kingdom companies and nationals, to maintain both our operational advantage and freedom of action.

There is, therefore, a continuing need for the Article 346 exemption to protect the UK's vital national interest. The market for defence equipment and services is not just another market to be integrated fully into the EU's general single market. Liberalisation can only be accepted as far as it does no damage to our national security.

That said, I am concerned that many states use the Article 346 exemption to protect their industries rather than to protect their national security. The UK, with a large range of industries supplying the defence market at home and abroad, and with a significant number of SMEs, stands to gain economically from a more open defence market in Europe.

On the other hand, I suspect that we will need to be particularly vigilant to protect our ability to sustain capabilities. We have already accepted that many advanced items of equipment such as fast jets can only be procured in international collaborations, but their sustainment in time of conflict is a vital national requirement. So, although the UK should generally press for service liberalisation, it must be much more cautious when it comes to defence support services.

I am broadly content with the current balance of competences and am concerned that the Commission, wrongly, seems to be developing ambitions to extend its powers to direct decisions in defence procurement.

However, while a more robust approach to Article 346 infringements may occasionally cause the UK some challenge, but overall it should bring greater opportunities for UK companies as they gain access to contracts that would not otherwise have been open to them. The UK needs to advocate a nuanced approach to these issues from the Commission but, ultimately, we must put our national security first and robustly oppose proposals that would compromise it.

The essence of the Commission's engagement with defence acquisition should be to enforce current rules and to enable pan-European cooperation on major projects. The EDA can play a significant role here, both in identifying areas of capability shortfalls

where European collaboration can help the security of the region, and sustaining industrial entities of sufficient scale to compete with the US giants. Declining or at best stable defence budgets around Europe mean it is unlikely that national champions of the traditional kind can be sustained. The missed opportunity to achieve the merger of EADS (now Airbus) and BAE Systems must illustrate the perils of nationalism.

On the other hand, as defence looks more and more to innovative solutions from non-traditional suppliers, defence procurement policy must be as concerned with the needs of SMEs as prime contractors. A strong focus on the needs of SMEs must therefore feature in all aspects of any part of EU policy.

In summary, I believe through the intelligent application of Article 346 challenge, through an appropriate competition policy, and through the mechanism of the EDA, we see the right structure for EU engagement in defence acquisition. A modest, incremental approach is needed to ensure effective competition and nothing more.

Yours sincerely,

Sir Peter Luff MP Mid Worcestershire

NCVO response to the Review of UK and EU balance of competences: call for evidence on the single market - free movement of services (public procurement)

About NCVO

NCVO champions and strengthens the voluntary sector, with over 10,000 members, from the largest charities to the smallest community organisations. Alongside our sister councils in Wales, Scotland and Northern Ireland, we make sure the voluntary sector can do what it does best www.ncvo-vol.org.uk.

NCVO convenes the Public Service Delivery Network, a group of 2500 organisations that have an interest in public service delivery. NCVO also convenes a special interest group of sub-contractor organisations involved in the Work Programme[1], and a Payment-by-Results working group[2].

NCVO activity in the areas of EU procurement and the Balance of Competences review

Over the past few years, NCVO has carried out extensive work in the areas of EU procurement and the Balance of Competences Review which has been used to inform this response.

Through our Chief Executive's role on the European Economic and Social Committee we contribute regularly to EU policy reviews, including the review of State Aid rules; exploring social entrepreneurship; evaluating the role of procurement for better service delivery outcomes; and facilitating the growth of the social investment and enterprise markets.

In 2011 we produced a report outlining recommendations for the review of the European Procurement Directives which was submitted to the European Commission. Following this we submitted a response to a Cabinet Office Policy Note on Legislative Proposals for the Revised Procurement Directives and new Directive on Concessions.

In July 2012, NCVO's Social Business Initiative Roundtable brought together UK Government officials, the Big Lottery Fund, the Big Society Capital and UK-based social investment experts to evaluate the potential benefit to the UK of the EU's Social Business Initiative.

Members of this Roundtable were:

- Corrinne Callaway, Chief Operating Officer, Social Finance
- Seb Elsworth, Director of Partnerships & Communications, The Social Investment Business
- Katie Hill, Social Investment Advisor, City of London Corporation
- Simon Rowell, Strategy and Market Development Associate, Big Society Capital (BSC)
- Julian Blake, Partner of Bates Wells Braithwaite Law Firm (BWB)
- Tim Davies-Pugh, Deputy Director England, Big Lottery Fund (BLF)
- Sir Stuart Etherington, Chief Executive, NCVO
- Oliver Henman, Head of European & International Team, NCVO
- Lara Newson, DWP
- Alexandra Meagher, Kieron Boyle - Cabinet Office

[1] http://www.ncvo.org.uk/practical-support/public-services/work-programme-sub-contractors
[2] http://www.ncvo.org.uk/images/documents/practical_support/public_services/payment_by_results_contracts_a_legal_analysis_of_terms_and_process_ncvo_and_bwb_30_oct_2013.pdf

In December 2013, NCVO hosted a Balance of Competences Roundtable aimed at gathering the thoughts and opinions of voluntary, community and social enterprises (VCSEs) on the current State Aid, public procurement and cohesion policy landscape. Attendees of the Roundtable were:

- Julian Blake, Partner of Bates Wells Braithwaite Law Firm (BWB)
- Phil Lakin, European Grants Manager, National Trust
- Helen Bernard, Head of Fundraising, Royal Society for the Protection of Birds
- Gerald Oppenheim, Association of Charitable Funds
- Pedro Telles, Procurement Law Specialist, Bangor University
- Ingrid Gardiner, EU Manager, NCVO
- Oliver Henman, Head of Partnerships and International, NCVO

Background

The voluntary sector's role in public procurement

The UK voluntary sector has been involved in public service delivery for many years. As such, we have extensive experience of government procurement policies and practice.

Charity accounts data, compiled in NCVO's Civil Society Almanac[3], shows that around a quarter of voluntary sector organisations receive income from government. In 2010/11 the voluntary sector received £14.2 billion (37 percent) of its income in the form of contracts and grants from statutory bodies. 50% (£7.0 billion) of this came from local authorities, highlighting the important relationship that exists between the voluntary sector and local government.

Over the past ten years, there has also been a shift towards service delivery contracts - worth £11.2bn in 2010/11, up from £6.8bn in 2000 (inflation-adjusted) - with a reducing number of grants available - worth £3bn in 2010, down from £4.4bn in 2000/11 (in real terms). As a result of this shift towards contracting, procurement rules have had more of an impact on the UK voluntary sector than previously.

Since 2000, the voluntary sector's statutory income has grown faster than total public spending, suggesting that the voluntary sector has become an increasingly important contributor to economic growth – particularly at the local level - and a significant actor in the provision of public services.

Our report *Open Public Services: Experiences of the Voluntary Sector*[4] provides recent case studies on: commissioning, supply-chain management, sharing information, managing scale, new forms of finance, managing risk and ensuring quality.

[3] http://data.ncvo.org.uk/
[4] http://www.ncvo.org.uk/images/documents/practical_support/public_services/open_public_services_experiences_from_the_voluntary_sector.pdf

Review questions

Q12) What do you see as the advantages and disadvantages of EU action on public procurement?

a) The advantages of EU action on public procurement

NCVO supports the general EU Treaty Principles of transparency, equal treatment, non-discrimination and proportionality and the rules concerning fair and transparent procurement that flow from these. It is vital that all providers bidding for contracts experience a level playing field without undue prejudice or favouritism. Accordingly, it is essential that contracting authorities are open and transparent throughout the commissioning process to ensure suppliers and the taxpayer know how and why decisions are made. EU action on public procurement also seeks to avoid unnecessary requirements being placed on providers by ensuring procurement is proportionate to the size and complexity of the contract being let. It is worth noting that through conversations with various legal experts and procurement specialists it is often claimed that if these rules did not exist at the EU level, the UK government would need to create its own set of regulations to achieve a similar contracting environment.

NCVO supported the European Commission's Social Business Initiative which called for the use of social or environmental criteria and quality in the assessment of public procurement contracts - especially in the case of social and health services – and for this to be reflected in EU legislation. This supports similar policy initiatives in the UK such as the Public Services (Social Value) Act 2012 and DCLG's Best Value Guidance - which place an obligation on contracting authorities to consider how they can improve the social, economic and environmental well-being of an area, and obtain value for money when procuring public services.

NCVO welcomes plans by the European Commission to introduce a new procurement Directive in 2014 which aims to reform the current procurement environment by making it simpler and more effective. The new Directive contains several measures that could help UK VCSEs bid for public contracts:

- *A new 'light touch' regime for certain contracts below €750,000*. The current 'Part B' regulations which this system will replace do little to highlight the distinct characteristics of social services, and have largely failed in their purpose to reduce the regulatory burden on the services they cover. The new regime offers an opportunity for a 'fresh start' and if implemented correctly, could help alleviate unnecessary procedures for all parties and allow more focus on the design and effectiveness of services. It recognises that most social and health 'services to the person' are best delivered by local or community based organisations and are of minimal interest to providers in other EU states. Their exclusion from the bulk of EU procurement rules therefore has a negligible impact on cross-border trade and EU competition.

- *The option for the UK government to make 'MEAT' (Most Economically Advantageous Tender) the mandatory basis for contracts awarded under the light-touch regime*. This would compel contracting authorities to consider wider social and environmental objectives when evaluating the award of contracts. It is widely reported by our members and the voluntary

sector more generally that price and cost increasingly trumps quality and value for money in public procurement. This is despite the Social Value Act 2012 and the UK government's Best Value Guidance which both seek to improve procurement practice in this respect. For example, one NCVO member reports how approximately four years ago a public health body let a smoking cessation contract where the contract specification was 80 percent quality and 20 percent price. Last year the contract was re-let at 40 percent quality and 60 percent price.

Better quality public services are central to the success of the Government's Open Public Services agenda and the reform of public services. Only by considering quality, price and social value can commissioners get a true picture of the value for money offered by different tenders. Although the Government is yet to officially confirm whether MEAT will mandatory under the 'light touch' regime, it is our understanding they have chosen not to make the most of this opportunity. Notwithstanding the Government's decision, NCVO views the EU's intention to improve procurement in this respect as commendable.

- *The option for the UK government to prohibit contracting authorities from using cost or price only as the sole award criterion in public procurement*. Similar to MEAT, this policy choice – if adopted by the Government – will oblige contracting authorities to consider other factors such as quality and social value, rather than bottom line price alone, when awarding public contracts. Given that existing policy has not adequately embedded these principles into commissioning culture, NCVO has urged government to make the most of this flexibility afforded by the European Commission – particularly if it is not minded to implement MEAT - and at a minimum apply it to all the 'services to the person' covered by the 'light touch regime'. However, as with mandating the use of MEAT and other improvements to procurement practice, this measure is unlikely to achieve the desired outcome unless it is accompanied by high quality guidance and training for procurement officials.

  Again, while it is currently unclear whether the Government will make the most of this opportunity, NCVO welcomes the European Commission's intentions in this area.

- *The option to make it mandatory for contracting authorities to divide large contracts into smaller lots and explain their reasons when this is not possible*. If adopted, this measure will help support SMEs (a category that includes the majority of VCSEs delivering public contracts) compete against large scale commercial bids. One of the main barriers facing VCSE organisations in public procurement is the increased use of large scale contracts. This is leading to a diminution of local knowledge and expertise to the detriment of public services and the people that use them.

  Large scale contracts that discourage the participation of smaller organisations have been most visible in the Government's flagship Work Programme[5]. Organisations wishing to deliver one of 40 prime contracts had to display an annual turnover of at least £20 million and the financial capacity to deliver large contracts that require significant cash-flow. Consequently only three charities successfully bid to become a prime contractor. Similarly,

[5] NCVO report on the Work Programme http://base-uk.org/sites/base-uk.org/files/news/11-10/ncvo_work_programme_concerns.pdf

the 21 prime contracts for the MoJ's 'Transforming Rehabilitation' require organisations to have an annual turnover of between £6-36 million.

The option to compel contracting authorities to split large contacts into smaller lots is a policy choice being deliberated by the UK Government, and as such, it is currently unclear whether this will be transposed into UK regulation. That said the Government plans to implement legislation in 2014 which aims to make procurement more accessible for SMEs. Given this direction of travel we are hopeful this measure will be adopted. Again, notwithstanding this decision NCVO welcomes the European Commission's efforts to address this barrier facing many smaller organisations seeking to tender for public contracts.

- *A turnover cap to facilitate SME participation***.** Contracting authorities will no longer be able to require that an organisation's turnover is more than two times a contract's value. Unreasonable and excessive turnover requirements are a problem widely reported by the VCSE sector as they can arbitrarily prevent suitable providers from bidding for contracts. One NCVO member from North London reports how their local authority required an annual turnover of £1 million for a £250,000 contract. Consequently they were unable to tender to deliver the service.

- *'Full life-cycle of costings' can be considered when awarding contracts*. This encourages contracting authorities to consider all costs over the life-cycle of works, supplies or services such as those relating to acquisition; consumption of energy and other resources; maintenance costs; and end of life costs, such as collection and recycling costs. Costs attributed to environmental externalities such greenhouse gas emissions and other climate change mitigation costs can be considered. This aims to encourage more sustainable and / or better value for money procurement over the long–term.

b) Disadvantages relating to EU action on public procurement

The misinterpretation of EU rules

As mentioned above, NCVO supports EU action which seeks to achieve fairness and transparency in public procurement. However, the manner in which these rules are often interpreted by individual contracting authorities can affect the quality of public services and often creates unnecessary bureaucracy and administrative requirements.

Effective and efficient public services demand that commissioners and procurement professionals engage with services users and the organisations that advocate on their behalf before commencing any procurement activity to assess the population's needs; consider service design; and understand and develop the supplier base. In practice though, contracting authorities often fail to engage with suppliers and users appropriately at this pre-procurement stage. VCSEs report a widespread but mistaken assumption on the part of commissioners that EU rules prohibit such dialogue, when in fact, they actually encourage this type of engagement. Being embedded in the communities that they serve, many VCSEs are well placed to contribute at this stage.

The misinterpretation of EU rules also characterises the 'Part B' services category - which includes services linked to local communities and meeting social need - which are assumed not to be of cross-border interest. Despite this category having few EU rules to follow, procurement professionals

often apply 'full EU procedures' (such as reporting and accounting obligations) when not required to do so. This highlights the strong culture of risk-averseness and inflexibility in contracting authorities when applying EU rules, even when these allow for flexibility and the use of discretion.

One example of the misinterpretation of EU rules is the introduction of a "51% rule" by the Learning and Skills Council (LSC). The LSC started using larger contracts for procuring ESF vocational and educational services and encouraged the forming of consortia to facilitate the participation of smaller organisations. However, this arrangement was threatened by the misinterpretation of EU Community rules whereby the LSC believed it was unable to procure services from consortia unless the lead partner delivered more than 51% of the contract. Although it was eventually decided that the consortium was permissible, a better understanding and interpretation of EU rules would have avoided the need for an appeals process and the seeking of legal advice which wasted time and money for both the contracting authority and the provider.

To alleviate poor practice, commissioners and procurement officials need to feel secure that they will not be challenged for certain decisions. To ensure the current risk averse behaviour that characterises 'Part B' services does prevent the new 'light touch' regime from reducing regulatory burdens, it is essential that the UK government provides clear, practical and comprehensive guidance making clear that commissioners must assume that contracts are *not* of cross border interest unless a strong case is made to contrary (to ensure EU case law is not applied unnecessarily). Government should also provide training and facilitate the exchange of good practice and case law examples of public procurement from across the Member States, to allow procurement professionals to apply rules and better exercise professional judgement appropriately.

Q5) In your experience do Member States take a consistent approach to implementing and enforcing EU rules, or not?

Procurement procedures

In contrast to other Member States, 70% of UK service contracts are being procured under 'restricted procedure[6]' (which limits the pool of suppliers and applies thresholds and other criteria more rigorously) even when an 'open procedure' (which is more flexible to bidders) would be a more appropriate procurement procedure. This has resulted in a more bureaucratic and complex bidding process which encourages contracting authorities to tender out larger contracts. As noted above, the increased use of large scale contracts is preventing some smaller organisations from participating in service delivery to the detriment of public service quality and users.

The transposition of the new EU Directive on procurement

Whilst Portugal, France and Italy are taking their time to incorporate the new EU Directive on procurement into their national laws, the UK and Denmark appear to be rushing to transpose the new rules in the shortest time possible. The Directives set out the main objectives to be adhered to while leaving national governments with some room for manoeuvre regarding certain procedural rules and other technical details. If this process is unnecessarily rushed, there is a risk the resulting

[6] 'The good, the bad and the ugly: EU's internal market, public procurement thresholds and cross-border interest', Public Contract Law Journal, 43-1 2013, pp. 3-25 – Perdo Telles

regulations will not be as effective in achieving a fair, proportionate and transparent procurement process as is possible.

FROM THE MINISTER

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www.delni.gov.uk

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Our Ref: COR/495/13

18 December 2013

Dear Jo

GOVERNMENT REVIEW OF THE BALANCE OF COMPETENCES BETWEEN THE UK AND THE EU

I refer to your letter of 29 October 2013 regarding the above review, which was issued to the Northern Ireland First Minister and deputy First Minister. The case has been forwarded to me for a response, which I am coordinating on behalf of the relevant Departments in the Northern Ireland Executive. The following commentary is offered in respect of the key elements of the review of the Social and Employment Balance of Competences:

Working Time Directive

The Department for Employment and Learning (DEL) has recently completed a review of Working Time legislation in Northern Ireland, which is currently identical to that in force in GB. DEL has since drawn up a consolidated version of the Regulations, and plans to bring these into operation during 2014. DEL continues to liaise closely with BIS on developments in relation to the implementation of *SiMap* and *Jaeger*, as well as CJEU case law dealing with the interaction of annual leave with sick leave and parental leave (*Stringer/Pereda*, etc).

Agency Workers Directive

DEL has commissioned researchers to carry out a review of the Agency Workers Regulations (NI) 2011, and the final stages of that review are nearing completion. The review is seeking to properly assess the impact of the Regulations, as well as the reasons for any difficulties encountered by agencies and hirers in meeting their obligations under the legislation. The review is also seeking to gauge how many agency workers there are in Northern Ireland, and their profile.

It is expected that the review will indicate the uptake by agencies of the 'pay between assignments' derogation, and the experience of workers who have signed such contracts. DEL is keen to ensure that its review of the Directive in Northern Ireland will be reflected in any UK input to the EU Commission's review of the transposition of the Directive across all Member States.

Posting of Workers Enforcement Directive

BIS officials have worked closely with DEL on the drafting and progress of the Enforcement Directive, and comments and inputs have been sought throughout. The Department appreciates the manner in which it has been consulted in this regard, as it has allowed for necessary approvals to have been obtained from the NI Executive on these proposals. The input of the devolved administrations to the development of EU proposals is crucial, and it is important that sufficient time is given to devolved administrations to allow for meaningful input to be contributed by the NI Assembly.

Pregnant Workers Directive

Northern Ireland law is compliant with the requirements of the Pregnant Workers Directive. However, DEL would have concerns about about the affordability of any substantial increase that may be proposed at EU level to the amount of paid leave available to new mothers. Whilst supportive of extending greater flexibility and choice to working parents, DEL wishes to ensure that businesses are not faced with additional burdens in a challenging global economic context.

Collective Redundancies Directive

DEL has just closed its public consultation on the Northern Ireland employment law review. The consultation explored the following options in regard to collective redundancies:

- maintaining the current arrangement (for redundancies of 100 or more employees: 90 days, and 30 days for redundancies affecting between 20 and 100 employees) ;
- adoption of either the UK or ROI (30 days for all sizes of redundancies) consultation periods; or
- applying minimum consultation periods for all sizes of proposed redundancies, of either:
  – 30;
  – 45; or
  – 60 days.

Policy recommendations have not yet been agreed, but initial indications are that a reduction in consultation periods may be appropriate.

Acquired Rights Directive

During January to April 2013, DEL, in conjunction with BIS, conducted a public consultation on proposed amendments to the TUPE Regulations, which transpose the Acquired Rights Directive, to address employers' concerns that the provisions are too burdensome on business. The Department is currently finalising its response

to the consultation, which will outline the legislative proposals to be brought forward in Northern Ireland, and the related timescales.

Parental Leave Directive

Following a process of public consultation, DEL this year extended the maximum unpaid parental leave entitlement from 13 to 18 weeks, in compliance with Directive 2010/18/EU. The Department is currently proposing, as part of a wider review of entitlements for working parents, to enable parents to avail of unpaid parental leave until a child's eighteenth birthday; a position that would be in advance of the Directive's requirements.

Mutual Recognition of Professional Qualifications (MRPQ) Directive

DEL has been fully engaged with the UK response to the Commission's Green Paper on the modernisation of the MRPQ Directive, and co-ordinated the final Northern Ireland response to BIS, which was supportive of the approach being taken.

Northern Ireland is a unique region in the UK, in that it has a land border with another EU member state, namely the Republic of Ireland, making the MRPQ Directive particularly relevant here.

DEL welcomes the modernisation of the MRPQ Directive which will continue to facilitate the mobility of professionals across the EU, provide for easier and faster recognition of qualifications and remove unnecessary administrative burdens, whilst also guaranteeing protection for consumers and citizens by ensuring that high standards are maintained in the recognition process.

DEL believes that the movement of qualified professionals across EU member states does bring significant benefits, and that anything that can be done to remove difficulties encountered by UK professionals who wish to work in other member states is to be welcomed.

Whilst DEL has an interest in systems supporting the recognition of qualifications across the EU, it is of the view that the UK competent authorities, which are responsible for receiving applications from EU citizens with professional qualifications and implementing the Directive, are best placed to comment on whether the cost of existing or future European rules in this area is proportionate to the benefits.

The above legislative provisions, which have their basis in EU Directives, comprise a significant proportion of all employment relations statutes in Northern Ireland. It is therefore critical that Northern Ireland and UK Government officials maintain a close working relationship, and open lines of communication, in relation to the development of all EU-level legislation.

In respect of employment legislation, Northern Ireland simply does not have the capacity to take forward its own interests on each separate issue directly with the European Institutions. We are therefore heavily reliant on UK officials and UKREP to work with us in this respect. We are also dependent on UKREP and UK officials to inform us about discussions which are taking place on each emerging and

developing Directive/Regulation, and would strongly urge regular and early reporting back on all developments and working group discussions to devolved administrations.

EURES

Until recently, DWP has represented Northern Ireland at a European Level in respect of the EURES programme. However, DEL's Employment Service has been actively engaging with DWP officials in order to strengthen links with European forums.

We value the opportunities this engagement provides to build stronger relationships and share best practice with other European Public Employment Services. Stronger links with DWP, as well as other European PES, facilitate the development of future business in our Employment Service and we highly value the opportunity to benchmark against similar organisations.

In June 2013, the Northern Ireland Department for Social Development carried out a consultation on the *Internal Market: Free Movement of Persons* strand of the Review, which addressed the operation of the social security coordination rules. The Northern Ireland Minister for Social Development, Mr Nelson McCausland, is therefore satisfied that his Department has no comments to make in relation to the present consultation.

Health and safety at work in Northern Ireland is the responsibility of the Department of Enterprise, Trade and Investment (DETI). DETI has confirmed that its Minister, Arlene Foster MLA, has asked the Northern Ireland Health and Safety Executive (HSE) to liaise with their Great Britain HSE colleagues, to try to ensure that the call for evidence secures an accurate assessment of the position across the UK.

Yours sincerely

DR STEPHEN FARRY MLA
Minister for Employment and Learning

cc: First Minister and deputy First Minister
Minister of Enterprise, Trade and Investment
Minister for Social Development

From the Office of the Minister

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Our Ref: DETI COR 526/2013

The Rt Hon Vince Cable MP
Secretary of State for Business, Innovation & Skills
Department for Business, Innovation and Skills
1 Victoria Street
LONDON
SW1H 0ET

17 December 2013

Dear Vince

REVIEW OF BALANCE OF COMPETENCES

Thank you for your letter of 21 October to the First Minister and deputy First Minister.

The First Minister and deputy First Minister have passed the Calls for Evidence in respect of The Single Market: Free Movement of Services and The Competition and Consumer Policy Reviews to me to reply.

Questionnaires have been completed in relation to the following:

The Single Market: Free Movement of Services review – Appendix A; and
The Competition and Consumer Policy review – Appendix B

These have been emailed to balanceofcompetences@bis.gsi.gov.uk as requested.

In completing the questionnaires I have taken the views of other relevant Northern Ireland Departments.

If your officials have any questions please liaise with Mr David McCune, Head of DETI Central Management Unit. His contact details are:

Email: david.mccune@detini.gov.uk
Phone: (028) 905 29422.

Yours sincerely

ARLENE FOSTER MLA
Minister of Enterprise, Trade and Investment

BALANCE OF COMPETENCES REVIEW: FREE MOVEMENT OF SERVICES

Call for Evidence questions

1. What do you see as the advantages and disadvantages of EU action on the free movement of services? How might the national interest be served by action being taken at a different level (for example, at the World Trade Organisation level, or at the national level), either in addition to or as an alternative to EU action?

   The Department for Enterprise, Trade and Investment (DETI) is not aware of any research to show advantages or disadvantages of EU action on the free movement of services.

2. To what extent do you think EU action on the free movement of services helps or hinders UK businesses?

   DETI is not aware of any research to show how EU action EU action on the free movement of services helps or hinders UK businesses.

3. To what extent has EU action on the free movement of services brought additional costs and/or benefits when trading with countries inside and outside the EU? To what extent has EU action on the free movement of services brought additional costs or benefits as a consumer of services?

   DETI is not aware of any research to show how EU action EU action on the free movement of services has brought additional costs or benefits.

4. How well, or otherwise, have the EU's mechanisms for delivering the free movement of services worked?

   DETI is not aware of any evidence to show how well, or otherwise, the EU's mechanisms for delivering the free movement of services have worked.

5. In your experience do Member States take a consistent approach to implementing and enforcing EU rules, or not?

   DETI is not aware of any evidence to show this.

6. Do you think the UK's ability to effectively regulate cross-border provision of services would be better, worse, or broadly the same, as the result of more or less EU action?

   DETI does not have a view on this.

7. What future challenges/opportunities might we face in the free movement of services and what impact might these have on the national interest? What

impact would any future enlargement of the EU have on the free movement of services?

DETI does not have a view on this.

8. Is there a case for more EU action to ensure that assessments for proportionality and necessity are more consistently interpreted? [see paragraphs 22 and 27 for more detail]. Or should the competence to assess these remain with member states as is the case now?

DETI does not have a view on this.

9. Should decisions affecting the integrity of the Single Market be taken by all Member States and apply equally to all, or do you believe it is possible to take further liberalising action either unilaterally or with a selection of other Member States, whilst maintaining the integrity of the Single Market?

DETI does not have a view on this.

10. What do you see as the advantages and disadvantages of EU action on the **mutual recognition of professional qualifications (MRPQ)**? To what extent do you believe that the cost of existing or future European rules in this area is proportionate to the benefits?

The Department for Employment and Learning (DEL) has advised that it was fully engaged with the UK Response to the European Commission's Green Paper on the modernisation of the MRPQ Directive. DEL co-ordinated the final Northern Ireland response to the Department for Business, Innovation and Skills in September 2011, which was supportive of the approach being taken.

Northern Ireland is unique in the UK in that it has a land border with another EU member state, namely the Republic of Ireland, which makes the MRPQ Directive particularly relevant here.

DEL believes that the movement of qualified professionals across EU member states does bring significant benefits, and that anything that can be done to remove difficulties encountered by UK professionals who wish to work in other member states is to be welcomed.

DEL is therefore strongly supportive of the modernisation of the MRPQ Directive which will continue to facilitate the mobility of professionals across the EU, provide for easier and faster recognition of qualifications and remove unnecessary administrative burdens, whilst also guaranteeing protection for consumers and citizens by ensuring that high standards are maintained in the recognition process.

The Department for Regional Development (DRD) has advised that it understands that Accountancy, Economist, Statistician, Internal Audit and Civil

Engineering qualifications (which are the professional specialisms within DRD) are already mutually accepted within the EU. DRD believe that this practice is both advantageous and proportionally beneficial and have no specific Departmental comments to make.

11. What do you see as the advantages and disadvantages of EU action on **company law**? To what extent do you believe that the cost of existing or future European rules in this area is proportionate to the benefits?

Company Law generally operates on a UK wide basis. DETI is not aware of any specific NI concerns.

12. What do you see as the advantages and disadvantages of EU action on **public procurement**? To what extent do you believe that the cost of European rules in this area is proportionate to the benefits? What is your view of the effect on the **defence sector**?

The Department of Finance and Personnel lobbied for the reform and modernisation of the EU Directives making strong representations to Europe, through the Cabinet Office, for a reduction in the levels of bureaucracy and a simplification of procurement processes. This had been a long standing issue within Northern Ireland particularly in relation to promoting SME access to public procurement opportunities.

For lower value contracts we had already taken measures to substantially reduce the inputs required from tenderers and shorten the time taken to award contracts. Northern Ireland was keen to see these measures apply to contracts with values above the EU threshold and I am pleased to note that the new procurement directives incorporate key changes along these lines.

Formal adoption of these draft directives concerning procurement is expected in early 2014 and in the meantime the Central Procurement Directorate is taking forward informal consultation with key Northern Ireland stakeholders. It will present the overall view to Cabinet Office.

The impact of the proposed changes can only be measured once they are implemented.

As the new public procurement directives have been subject to considerable negotiation we do not believe that any further action is needed at present.

Finally in relation to Defence, the legislation will have a very limited application and impact in Northern Ireland and we would not press for further action in this area.

13. Are there any general points you wish to make which are not captured above?

With assistance from BIS, the, Northern Ireland, Department for Enterprise, Trade and Investment has been working closely with Northern Ireland LAs and CAs to ensure they are aware of their obligations under the Services Directive.

However there have been some difficulties with the implementation of the EU Services Directive with the majority of the LAs and CAs not wholly ready to accept online applications by 28 December 2009. Anecdotal evidence from some NI Authorities would suggest that there are limited perceived benefits in implementing the Services Directive and feel that the cost of doing so has been much higher than any rewards that may be gained. We do not keep statistical data with regards to the number of online forms received by NI Authorities compared to hard copy forms received however we are aware that the numbers involved for many of the NI Authorities are very small.

The EU Services Directive doesn't necessarily lend itself to the devolved nature of the UK. By way of an example, the European Commission has issued a Letter of formal notice – Infringement No 2013/2188 on 17 October 2013 to the United Kingdom for failure to implement the EU Directive 2006/123/EC on Services in the Internal Market ('the Directive'), and the UK's implementing legislation, the Provision of Services Regulations 2009 ('the Regulations').

The infraction proceedings relate to the national applicability of authorisations, or licences, to provide services. Article 10 (4) of the Directive requires that licences enable service providers to operate throughout the national territory of a Member State, unless there are overriding reasons relating to the public interest. This requirement is implemented by regulation 15(5) of the Regulations. However, regulation 15(6) contains a derogation from this requirement which states that a licence issued by a licensing body (referred to as a 'competent authority' in the Regulations) whose functions relate to only a 'part' of the UK, will only apply to that 'part' of the UK. The Commission claims that this derogation contravenes Article 10(4) of the Directive.

This issue has highlighted a number of areas where the national applicability of licences would not be appropriate, a prime example of which is the separate and distinct regulatory regimes which operate for gas and electricity in Great Britain (GB) and in Northern Ireland, which reflect not just the devolution settlement but the particular structure of the two energy markets. Each regulatory authority imposes its own system of regulatory requirements in line with the different market and legislative arrangements in place in GB and NI. Regulatory requirements are enforced through the licences issued for different market activities, as licence conditions and industry codes.

If the Commission do not accept that there are overwhelming public interest reasons why the current separate regulatory arrangements should remain in place, not least the principle of devolution of energy matters and the benefit to energy consumers in both GB and NI, then significant issues in relation to devolution principles will arise with the potential need to review and amend the entire energy market arrangements and all underpinning legislation, licences and industry codes in Northern Ireland and GB.

Ofcom Response to the UK Government Review of the Balance of Competences Between the United Kingdom and the European Union

Introduction

Ofcom welcomes the opportunity to submit evidence to the Government's Review of the Balance of Competences between the United Kingdom and the European Union. As the United Kingdom's independent regulator for the communications sector, Ofcom is the appointed National Regulatory Authority (NRA) for the purposes of the relevant EU frameworks in telecoms, audiovisual services, and post, with concurrent consumer and competition powers. We are also the UK's spectrum management authority and represent the UK in international spectrum discussions under a direction from HMG. We are therefore closely involved in the operation of the existing rules in these sectors, a large part of which derive from European law.

In fulfilling our functions it is important to highlight that Ofcom's principal duty, set out in section 3(1) of the Communications Act 2003 is:

- to further the interests of citizens in relation to communications matters; and
- to further the interests of consumers in relevant markets, where appropriate, by promoting competition.

The existing European regulatory frameworks in the areas over which Ofcom has regulatory oversight are broadly speaking designed to promote competition and the development of the single market in telecommunications, radio frequency management, audiovisual and postal services, while protecting the interests of EU consumers and citizens.

In both its legislative and its implementation work, the European Commission continues to push for greater regulatory consistency across the continent, and to work towards the "completion" of the single market with a view to promoting European competitiveness in an increasingly globalised world.

In this response we consider how both the current EU framework and the activities and structures in place to implement it are delivering for UK citizens and consumers.

Key messages

- Ofcom believes that, to date, **the EU regulatory frameworks in the communications and postal sector have delivered significant benefits** in terms of growth, innovation and competitiveness, both for the EU as a whole and for the UK in particular. Consumers have also benefitted from increased competition in these markets, enjoying greater quality and variety of communications services, at consistently low prices, while innovation and indeed investment have continued apace.

- **The specific balance of EU vs. national competence within each of our sectors varies**. In some cases (e.g., telecommunications), we largely operate under a maximum harmonisation

framework common to all EU Member States and with limited scope for departure, whereas in others (e.g., audiovisual and to some extent post), the EU has set only minimum rules, allowing Member States to introduce stricter requirements, if they so wish (as indeed the UK has done). Spectrum remains a national resource predominately managed at national level; however, a certain degree of coordination and technical harmonisation are needed to enable the exploitation of European economies of scale, and by extension EU global competitiveness.

- **We believe that the current balance is broadly right**. While in some cases EU-level action will be necessary to achieve the desired policy outcomes, it is important for the EU to continue to acknowledge that certain decisions are best taken locally, in a way that takes account of specific national circumstances, and to recognise the need to preserve a degree of national discretion, including for regulators to innovate in the design of regulatory solutions.

- Whether or not there is a need for **EU oversight or intervention is something that will need to be considered on a case-by-case basis**, and the added value of action at EU level will need to be justified on the basis of evidence. In considering such action it is important to adopt a principles-based approach which builds in appropriate examination of key considerations. For example, in considering the case for EU level action it is important to examine the existence of benefits from economies of scale, the value of promoting transnational markets and the need for coordination to avoid technical interference and ensure co-existence of spectrum services. These then need to be weighed against domestic concerns and other national policy considerations, as well as to recognise the distinctiveness of national markets and local knowledge in the design of remedies. We elaborate on this below through some specific examples in relation to each of the sectors that we regulate.

- Over time, **the role of NRAs has been acknowledged and embedded by EU legislation**, including through the strengthening of their independence (with respect to national governments and regulated entities) and capacity, and through the creation of networks of NRAs charged with exchanging regulatory best practice and advising the European institutions in the performance of their functions.

    - In relation to telecoms, BEREC (the Body of European Regulators in Electronic Communications) is a network of NRAs created by European regulation and given a statutory role to advise the European institutions and assist in the implementation of the regulatory framework.

    - In the area of spectrum, the Radio Spectrum Policy Group (RSPG) brings together Member State representatives responsible for spectrum to promote the harmonisation and coordination of spectrum management across the EU.

    - In the area of post, the European Regulators' Group for Post (ERGP) was similarly created as an expert advisory group to the Commission that also exchanges information between members and promotes best practice.

    - In the audiovisual field, the Commission has recently announced its intention to convene Europe's audiovisual regulators in order to draw upon their collective expertise in the development of European policy in this area.

    - In relation to consumer protection, the Consumer Protection Cooperation (CPC) Network links consumer law enforcers across the EU to help promote information sharing and coordination of cross border enforcement activities under the CPC Regulation.

- Ofcom participates in all of these networks, maintaining strong working relationships with our European counterparts in each of the sectors we regulate. Such **regulatory coordination** at the European level has been, and will continue to be an important tool to exploit the benefits of the single market, allowing us to both share best practice and learn from others, while providing mechanisms to enhance the consistency of regulatory approaches across the continent, without the need for top-down EU action.

Telecommunications

Compared with some other economic sectors, the telecommunications sector is now largely 'open' and direct barriers to cross-border trade and market entry have been removed throughout the EU. Following privatisation of national telecommunication operators, European directives were promulgated in the late 90s setting out a framework for competition ("open networks") in national markets. The promotion of competition has since remained the *fil rouge* of the European telecoms regulatory framework, including through soft law instruments promulgated by the European Commission.

Since 2002, the telecoms regulatory framework has also focused on harmonising regulatory approaches across the EU, with a view to raising the quality and effectiveness of regulation across Europe and improving conditions for the full exploitation of the single market.

In this area, the Commission and NRAs have shared responsibilities for regulatory policy: while it is the role of the Commission to determine the overall European policy direction, it is the role of NRAs (working in cooperation with their respective governments), once policy proposals have been duly considered and amended by both the European Parliament and Council through the legislative process and subsequently transposed nationally, to adapt and implement the rules in their national markets. It is also the role of NRAs (individually and working collectively within BEREC) to alert the European Commission and European legislators to the practical impact that EU policy initiatives and legislation are likely to have "on the ground".

One recent example of this dynamic is when NRAs argued against the Commission's initial plans (in late 2011) to increase the price of **wholesale access to copper networks** in areas where operators had made a commitment to invest in new fibre infrastructure. The Commission's approach was intended to incentivise network operators to undertake these new (and expensive) investments by providing some of the required funds. However, this proposal was not without unintended consequences. Firstly, it would have meant alternative operators relying on wholesale access to incumbents' copper networks facing increased charges, which they would have needed to pass onto their consumers. This would, in turn, have led to price increases for consumers using current generation broadband services (in effect, resulting in today's consumers subsidising tomorrow's consumers). Secondly, there was scepticism as to whether such an approach would have indeed incentivised incumbents to invest in the new fibre infrastructures as the Commission had originally intended, while the business case (i.e. consumer demand) was not proven. Finally, the proposed approach was at odds with Ofcom's policy of ensuring that consumers are not worse off as a result of a change in the underlying network technology. Ofcom and BEREC brought the unintended consequences of this approach to the attention of the Commission. This led the Commission to reverse its original position, focusing instead on predictability of copper prices rather than on their deliberate suppression.

In some cases, EU-level action has been critical to unblocking difficulties (whether practical or political) and to secure coordinated action for the collective benefit of all European consumers. The most notable recent example of this is in relation to **international roaming**, where NRAs themselves

– including Ofcom - recommended that the Commission introduce European legislation to regulate the (very high) charges faced by mobile phone users travelling abroad within Europe. Given the cross-border dimension of the issue, no single NRA could address the problem alone, and in order to ensure coordinated action on the same terms across Europe, a directly-effective EU Regulation was found to be the appropriate solution.

In other cases, an extension of EU competence may not be warranted. This is the case, for example, in the **design of regulatory remedies**. The Commission has in the past (in 2002 and again in 2009) sought to gain a power to veto the specific remedies that national regulatory authorities are able to impose on operators following a finding of significant market power. The Commission has justified such an extension of power as the best way to address what they see as an inconsistent application of the regulatory framework across Member States, which in turn creates fragmentation that hinders the further development of the single market. We have never been convinced of such an argument. Firstly, NRAs have the practical, on-the-ground knowledge and the best understanding of their local markets. They are therefore best placed to design the most appropriate remedies to effectively address competition problems, particularly in fast-moving market environments such as these. Secondly, with its overarching objective to promote the single market, the Commission has been wary of taking risks (reluctant to set precedents) and can therefore be resistant to regulatory innovation.

Ofcom has been at the forefront of such regulatory innovation in the past, something that would not have been possible if the regulation of national markets had been wholly or mainly controlled out of Brussels. By way of example:

- When Ofcom originally proposed to use the "functional separation"[1] of BT to increase competition in the UK telecoms market, the European Commission expressed serious reservations over what was seen at the time as a radical regulatory remedy, and sought to persuade Ofcom to abandon the idea. In the end, Ofcom went ahead despite these reservations (using its legal powers as a concurrent competition authority, therefore outside the Commission's control). This approach was ultimately acknowledged as a success, so much so that the European Commission subsequently made functional separation a remedy explicitly available to all NRAs (Articles 13a and 13b of the Access Directive, as amended in 2009).

- A key component of the functional separation remedy in the UK is a particular form of non-discrimination obligation known as "equivalence of input" (EOI) – that is, ensuring that BT's wholesale customers are able to use exactly the same set of regulated wholesale services, at the same prices and using the same systems and transactional processes, as BT's own retail activities. Once again, the experience of EOI in the UK has been successful, leading the Commission to formally recommend that NRAs should give preference to this approach when considering non-discrimination remedies in their national markets.

- Another example from the UK – when Ofcom reviewed the UK market for wholesale line access (WLA) in 2010, it imposed a form of bitstream (network) access remedy known as "virtual unbundled local access" (VULA). The European Commission had long expressed a strong preference for physical access (which theoretically gives the access seeker more control of the line than VULA, but which also requires a significant investment from the access seeker). Ofcom engaged in intensive and protracted negotiations to persuade the European Commission of the

[1] The principle underpinning Functional Separation is that the natural monopoly parts of the incumbent business should be placed in an organisationally separate entity subject to its own governance arrangements. This then reduces both the incentive and ability of the incumbent to discriminate in favour of its own downstream business.

merits of our approach (noting that the preference for physical access was enshrined in a European Commission recommendation on NGA). Since then, a handful of other NRAs have also pursued the VULA route. VULA is now seen to be so successful that the European Commission recently proposed that (a standardised form of) VULA be mandatory across Europe, in preference to physical access (see the draft Regulation on "Connected Continent: Building a Telecoms Single Market").

Finally, over the last ten years the Commission has on several occasions socialised the idea of establishing a centralised "Euro-regulator" to replace NRAs – an idea that Ofcom has consistently resisted. The fact is that national markets have legitimate and immutable differences (e.g. in relation to network topology, prevailing network technology, historical investment cycles, consumer demand patterns, market structure, demographics, economics). These, sometimes substantial, differences will exist to some degree whatever the institutional design, and cannot be eliminated by regulatory fiat. Indeed, even in a hypothetical world made up exclusively of consolidated pan-EU operators benefiting from a single EU authorisation, NRAs would still have an important role to play, given the enduring (and "un-harmonisable") differences between national markets which would require continued "sub-regional" regulatory attention. The current regulatory system recognises the important role that NRAs (on their own and working collectively through BEREC) play.

Audiovisual

Audiovisual media is primarily a national matter, intrinsically linked with national cultural and public interest concerns and for which the Member States remain exclusively competent. However, insofar as the provision of audiovisual media constitutes a commercial service, the EU must ensure that there are no barriers to cross-border exchanges of audiovisual material.

The major EU instrument in this area is the Audiovisual Media Services" (AVMS) Directive, adopted back in 1989 and most recently reviewed in 2007, which coordinates national rules relating to the provision of broadcasting and video on demand services. These include establishment criteria, advertising, sponsorship, tele-shopping, protection of minors, public order, right of reply, and the promotion of European programmes. Member States are required to ensure that television broadcasters under their jurisdiction comply with the minimum programme standards set out in the Directive, although they can also impose additional domestic requirements.

The Directive introduced a "country of origin" (COO) principle, whereby broadcasters need to be licensed in only one Member State (and are subject only to that Member State's broadcasting standards) but can broadcast across the rest of Europe. The COO principle is a key instrument in the promotion of the digital single market for audiovisual services, lowering the regulatory and administrative burdens on industry and thereby encouraging the availability of pan-European (broadcast and video on demand) content.

The UK is home to over half of the channels licensed in Europe, including many US companies that have an EU-wide reach, and half of these broadcast outside of the UK (either exclusively or in addition to UK broadcasts). The presence of these companies has greatly contributed to our economy and cultural diversity in the UK.

However, the effect of the COO principle is that a Member State and its regulatory authority might not be able to enforce national content standards over all of the content viewed by its citizens (i.e. citizens might be exposed to content licensed in another Member State and subject to the standards

applicable in that jurisdiction, which might be lower/different than those that apply at home). The current framework of harmonised minimum standards is intended to mitigate such concerns.

The current AVMS Directive, we believe, strikes the right balance between the (industrial policy) aim of ensuring broadcasters do not need 28 licences, and the (social/democratic) aim of respecting cultural diversity among Member States and the ability of their respective regulatory authorities to protect their citizens accordingly. However, we also recognise that there are remaining and inherent tensions in the current design and that some of the coordination mechanisms which are currently provided in order to ensure that the country to which programmes are being broadcast can enforce local norms could be improved. This is an issue we believe may benefit from increased coordination at EU level, particularly as we move towards an increasingly converged and online distribution model for audiovisual content.

Spectrum

Decisions taken at European, regional and global level drive the way in which spectrum is allocated and used in the UK. This notwithstanding, Member States remain responsible for management of spectrum in their own territories and for co-ordination with neighbouring countries on cross-border interference issues.

The EU plays a key role in terms of harmonising technical conditions to ensure that key spectrum bands are made available on the same basis across the EU. This is vital to deliver economies of scale and interoperability and brings significant benefits to UK and European consumers. The EU has also aimed to encourage further market liberalisation, spectrum sharing and secondary trading – goals that the UK would share. We certainly recognise the importance of international and European coordination to enable efficient use of spectrum and deliver the benefits of harmonisation.

For example, where spectrum bands are subject to European technical harmonising measures Ofcom considers it generally appropriate for the Commission to set timescales and ensure the release of new spectrum by stated deadlines. This is the case with the bands used for mobile telephony, including the recently released 800MHz and 2.6GHz bands, which are already subject to such harmonising measures. However, it is important to retain a degree of national flexibility, for example to resolve any coexistence issues that are best addressed at national level or in terms of obligations attached to licences to meet national requirements.

Ofcom would generally be concerned if the Commission aimed to harmonise beyond technical conditions, for example if they sought, as currently proposed in the Connected Continent Regulation, to have a greater role in deciding the timing and form of spectrum auctions and assignments. This would in our view constitute an unwarranted transfer of substantive responsibilities for spectrum management to Europe

Post

The current EU postal regulatory framework has established, via three postal directives, common rules and minimum provisions concerning the key elements of postal regulation including: the provision of the universal postal service for letters and standard parcels up to 10kgs and its basic requirements; the conditions governing the provision of postal services; cross-border quality of service standards; mechanisms for the financing of universal services where these are seen as an unfair burden on the universal service provider(s); the gradual and controlled abolition of the universal postal service monopoly between 1997 and 2012; tariff principles and accounting

transparency; minimum consumer protection measures including complaint handling procedures; and the existence of independent national regulatory authorities.

In some of the above areas, Member States have discretion: for example, the Member State has discretion to decide which of three ways it uses to ensure universal service provision, comprising a tender, designation of one or more providers or allowing market forces to deliver it. Another example concerns the ability of the Member States decide of their own accord whether to introduce a funding mechanisms for the universal service where it has determined that the universal service obligation represents an "unfair financial burden" on the universal service provider.

Moreover, in several respects, the UK framework goes beyond the minimum standards set in the Postal Directive, for example in respect the specification of the universal postal service in the UK and in respect of quality of service standards. In these areas, the UK has a six-day minimum collection and delivery requirement (rather than a collection and delivery every working day as required by the Directive). Furthermore this includes a requirement for a next day service and a range of supplementary quality of service targets, including for next day and second-class delivery, which the universal service provider is required to fulfil.

Overall, Ofcom considers that the EU postal regulatory framework allows Member States sufficient latitude to take account of national differences and supports the efforts of European Regulators' Group for Post (ERGP) to undertake over time a review of regulatory practice to ensure that the principles in the Directive are appropriately developed and put into effect across all Member States.

Conclusion

Ofcom's work is underpinned by our principal duty to further the interests of UK citizens and consumers, where appropriate through the promotion of competition. With moves to broaden and deepen the single market it is essential that this is not at the expense of consumer protection and empowerment. As we set out in our response to the Commission's consultation on its post i2010 strategy, Ofcom believes that people, whether as consumers or citizens, need to be at the centre of the Digital Agenda, both in the UK and in Europe. This means a shift in emphasis away from simply creating the conditions for market-based competition to take place – although this is of course still critically important. Our own experience to date clearly shows that promoting open and competitive markets is not always sufficient on its own to ensure that consumers' and citizens' interests are secured.

Indeed, when the European Commission has published proposals which Ofcom has believed not to be in the UK's best interests, we have engaged with decision-makers in Brussels to make our case and seek appropriate modifications. The UK and Ofcom have a good track record of successfully championing changes to both legislative and non-legislative Commission proposals, as well as identifying and cultivating alliances to help realise our shared objectives. The current system, providing such opportunities for dialogue with the EU institutions and our European counterparts, works well.

It is worth noting that even once European legislation has been negotiated and is adopted, decisions taken by Member States on *how* European law is implemented at the national level can also have an impact on the ability of national decision-makers to exercise their discretion effectively. For example, taking an area of particular concern to Ofcom at the moment, the gold-plated UK implementation (in 2003) of European regulatory requirements on appeals of NRA decisions has

inadvertently cultivated a culture of litigation in our sector, resulting in regulatory delays and high regulatory costs, ultimately to the detriment of UK citizens and consumers.

In conclusion, as we have described above, the basis of the current "co-regulatory" system operating in the communications sector is balance. There is often a tension between the European Commission's broader single market agenda and NRAs' preferences based on their "on the ground" operational and market expertise. In our view this is a desirable and potentially "creative" tension, and one which helps ensure that both the Commission and the national regulators are disciplined in their interactions with each other. Indeed, the operation of the EU machinery, as set out under the Lisbon Treaty, has embedded this creative tension within the European legislative process, as well as enhancing the role of national parliaments.

As BEREC, the RSPG, the ERGP and the new expert group of audiovisual regulators evolve and mature, we believe this "balance" can and must continue to be developed and maintained. The best outcomes for UK consumers and citizens (and indeed for EU consumers and citizens) are likely to come from the dynamic push-and-pull between Europe and its Member States, continually synthesising the goals and benefits of a properly functioning single market, on the one hand, and the imperatives of national subsidiarity, on the other. Any push for the further centralisation of power in the sectors we regulate should therefore be approached with great caution.

January 2014

Kick-starting growth:
How to reignite the EU's services sector

April 2013

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FOREWORD BY GUSTAV BLIX

The European economy is in serious trouble. The EU's share of global GDP in 2017 is set to drop to 17% - over a third less than in 1990. It is vital that Europe looks at a range of different ways to kick-start growth to reverse this trend and regain competitiveness in the global race.

But it isn't simply a question of the EU's relative position in the world. The union is plagued by unsustainable levels of unemployment, deficits and debt – problems that can only be met by economic growth. Regardless of what other parts of the world do, we need to create an environment where individuals, families, and businesses can work, trade, consume, save and invest without being overburdened by overly onerous regulation and other obstacles. In other words, what Europe is lacking is economic freedom – the cornerstone of an environment conducive to economic growth and opportunity.

Nowhere is this as obvious as in Europe's service industries where increased cross-border trade is a huge untapped resource. Services dominate Europe's economy - accounting for over 70% of total output - but they remain a small proportion of EU trade – accounting for only around one-fifth of the EU's internal exports and imports. This unbalance urgently needs to be addressed.

This timely report shows the huge potential economic gains to be had from liberalisation and boosting cross-border trade in services, and explores several different avenues to achieve this. The first step should be clear: start with properly implementing what has already been agreed amongst EU leaders which, as Open Europe shows, could boost the EU economy by some €230bn. Even though the additional steps set out by Open Europe in this report require further consideration, they provide a stimulating contribution to the debate regarding the EU's economic future.

This is a debate that we cannot afford to dodge any longer.

Gustav Blix
Member of Swedish Parliament (Moderate Party), Ranking Member, The Committee on European Union Affairs

WHAT THEY SAY ABOUT THE NEED TO REVIVE THE EU'S SERVICES SECTOR

"We have a Single Market of goods, but not quite a Single Market for services. We still have to work at it."[1]

- **German Chancellor Angela Merkel, 18 February 2013**

"We need to get [the EU's] growth engine going again. So one of the ideas we will explore further is how we can get the services directive up and running. The services directive has been watered down, and nothing has been left, because countries could not agree."[2]

- **Dutch Prime Minister Mark Rutte, 25 January 2011**

"It's incredibly important that we now fully implement the services directive…this would mean a fantastic vitamin injection for the EU economy."[3]

- **Swedish Minister for Trade Ewa Björling, 27 November 2012**

"Member states must fully implement the Services Directive as soon as possible."[4]

- **Italian Prime Minister Mario Monti in the 'Monti Report' 9 May 2010**

"The ambitious transposition of the Services Directive will be the most important structural reform."[5]

- **Former Spanish Economy Minister Elena Salgado, 24 May 2009**

"Member states, in line with calls from the European Council, should ensure that the Directive can deploy its full force."[6]

- **European Commission, 8 June 2012**

1 Bundeskanzlerin, 18 February 2013, http://www.bundeskanzlerin.de/Content/DE/Rede/2013/02/2013-02-19-ihk.html
2 Guardian, 25 January 2011, http://www.guardian.co.uk/politics/2011/jan/25/davidcameronnetherlands?INTCMP=SRCH
3 Swedish Riksdag, 27 November 2012, http://www.riksdagen.se/sv/Dokument-Lagar/Kammaren/Protokoll/Riksdagens-protokoll-2012133_H00931/
4 European Commission, A new strategy for the Single Market at the service if Europe's economy and society, Report to the President of the European Commission, José Manuel Barroso by Mario Monti, 9 May 2010, http://ec.europa.eu/bepa/pdf/monti_report_final_10_05_2010_en.pdf
5 La Vanguardia, interview of 24 May 2009, http://www.lavanguardia.com/economia/noticias/20090524/53709268013/elena-salgado-nos-queda-un-margende-endeudamiento-de-150.000-millones.html
6 European Commision, communication on the implementation of the Services Directive, 8 June 2012, http://ec.europa.eu/internal_market/services/docs/services-dir/implementation/report/COM_2012_261_en.pdf

EXECUTIVE SUMMARY

- Despite the economic problems in the eurozone and throughout the EU, Europe is sitting on a huge amount of untapped potential growth and employment in the services sector. Further liberalisation of services by fully implementing the existing Services Directive and implementing a new "country of origin" principle would massively boost cross-border trade and produce a permanent increase to EU-wide GDP of up to 2.3% or €294bn, in addition to the €101bn already gained under the Services Directive (0.8% of EU GDP).

- For various political reasons, the implementation of existing rules and an EU-wide agreement to further services liberalisation has proved difficult to achieve. However, under 'enhanced cooperation', a smaller group of EU countries should now press ahead with greater integration in services – this mechanism has been used three times before, including for the proposed Financial Transaction Tax (FTT). This was an idea first floated by Mark Rutte, the Dutch Prime Minister, in 2011.

- In a "pro-growth" letter in February 2012, twelve member states – the UK, the Netherlands, Italy, Estonia, Latvia, Finland, Ireland, Czech Republic, Slovakia, Spain, Sweden and Poland – all committed themselves to "open up services markets" with "urgency, nationally and at the European level, to remove the restrictions that hinder access and competition".

- We estimate that if this group of countries were to further open up their services markets under enhanced cooperation, it would still produce a lasting boost to EU GDP of up to 1.17% or €147.8bn in addition to the economic gains already realised under the Directive. If other countries, such as Germany, were persuaded to join, the economic benefits would be increased further. This boost would dwarf the estimated benefits of other recent EU 'pro-growth' proposals, such as the €60bn in extra lending from the European Investment Bank. Ultimately, this measure should serve as a springboard to achieve services liberalisation for the EU as a whole.

- In addition, there are currently around 800 regulated professions across the EU – 25% of which are regulated in only one member state – that create barriers to professionals seeking to provide services outside their own country. Enhanced cooperation could therefore also be used by the participating member states to make a commitment to collectively reduce the number of regulated professions in their economies by at least 15%.

- Concerns that enhanced cooperation in services would fragment the Single Market are largely misplaced. Indeed, under the FTT and EU patent proposals it was argued that enhanced cooperation boosted the Single Market by removing disparities between the participating countries. The same principle must logically apply here.

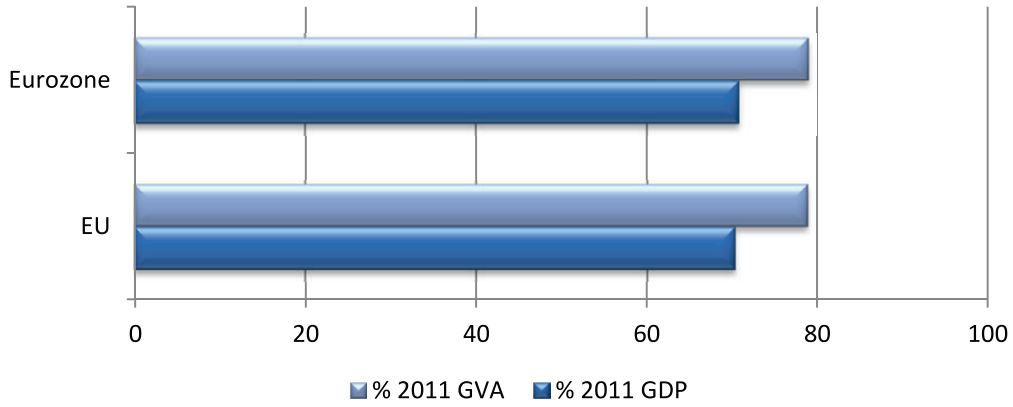
- The political benefits of further services liberalisation, even to those countries that might simply give tacit approval to enhanced cooperation, are threefold:

    1. It would be a positive, constructive, and pro-European means by which to secure continued engagement in the EU from non-euro countries, including the UK.
    2. It would provide a new legally enforceable framework to improve competitiveness and growth in the Southern euro member states and therefore boost the economic prospects of the eurozone, but without costing an extra cent of Northern countries' taxpayers' money.
    3. It would improve EU-wide growth, competitiveness and employment at a time when Europe is at risk of global economic decline.

1. WHY THE EU CAN'T AFFORD TO RESIST FURTHER SERVICES LIBERALISATION

Trade liberalisation within the EU is far more developed for goods than for services; services are a large proportion of the EU economy, but they remain a small proportion of EU trade.[7] Services account for over 70% of Europe's output but only account for around 23% and 22% of the EU's internal exports and imports respectively.[8]

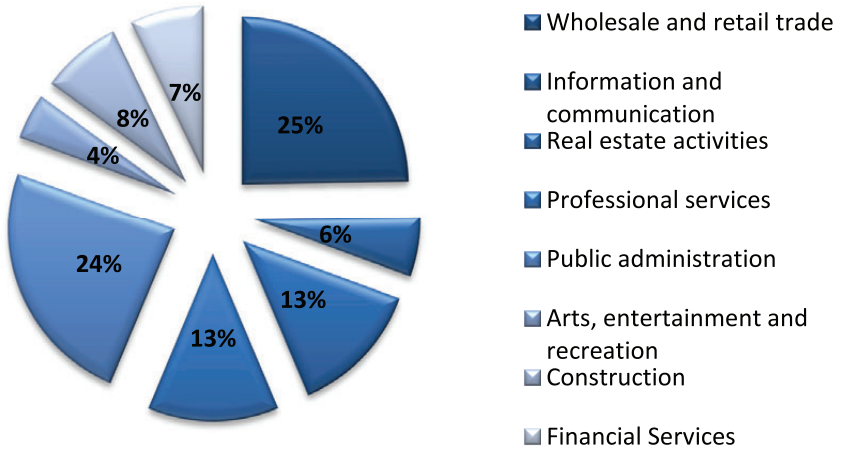
Graph 1: Importance of services sector to EU economy



Source: Eurostat

In the EU, services are regulated by a complex mix of national and EU regulation (see Annex I for more detail). A large variety of services sectors are covered by the EU's Services Directive[9], which together represent over 40% of EU GDP, such as retail and wholesale trade, construction and crafts, professional services, tourism, leisure sectors, etc.

Graph 2: Shares of EU services sector GVA (2011)



Source: Eurostat

Some important sectors are excluded from the Services Directive, such as financial, telecommunications, transport services and healthcare, but most of these are covered by other EU internal market legislation.[10]

7 For a discussion see Open Europe, 'Trading Places: is EU membership still the best option for UK trade?', 2012, p16; http://www.openeurope.org.uk/Content/Documents/Pdfs/2012EUTrade.pdf

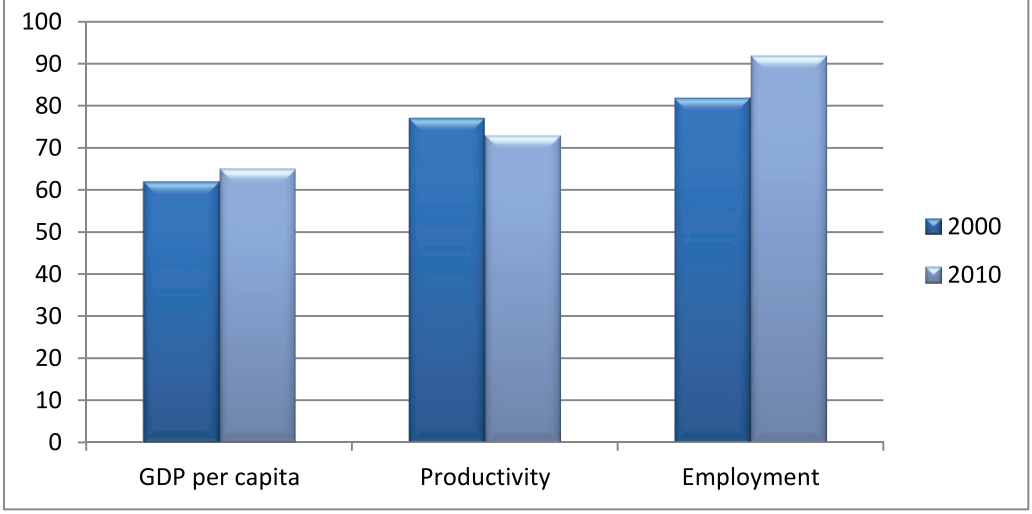
8 HM Government, 'The European Union Single Market – what has been achieved in twenty years?' in 'Twenty years on: The UK and the future of the Single Market', CEPR and HM Government, 2012, p1

9 DIRECTIVE 2006/123/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 12 December 2006 on services in the internal market; http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:376:0036:0068:en:PDF

10 European Commission, 'The economic impact of the Services Directive: A first assessment following implementation', June 2012, p6

As the graph below shows, the EU has made limited progress in catching up with US GDP per capita despite substantial progress in catching up in terms of employment – the result being that the EU's productivity per hour worked fell relative to that of the US between 2000 and 2010.

Graph 3: EU economic indicators as share of US (US=100)



Source: European Commission President José Manuel Barroso[11]

Much of this productivity gap can be explained by the differing productivity performance of US and EU service industries.[12]

Table 1: Sector contributions to labour productivity growth (1995 - 2007)
(Average annual growth rates in %)

	Total Market Economy	ICT Production	Goods Production	Market services	Reallocation[13]
EU	1.6	0.4	0.7	0.6	-0.2
US	2.6	0.8	0.3	1.8	-0.2
UK	2.6	0.5	0.7	1.6	-0.2

Source: 'Service Sector Productivity', Chapter 7, 'Twenty Years On: The UK and the Future of the Single Market', BIS 2012.

11 Europe's Sources of Growth, Presentation by President of the European Commission Jose Manuel Barroso to the European Council of 23 October 2011 http://ec.europa.eu/europe2020/pdf/barroso_european_council_23_october_2011_en.pdf

12 In 2012, Mustilli and Pelkmans noted that, "Since 1995, EU productivity growth in services has fallen to a low annual average precisely when that of the US increased sharply…Empirical analysis quickly detected that productivity growth differentials, in just a few services sectors, were the main cause of the trend change." See Mustilli, F. and Pelkmans, J., 'Securing EU growth from services', CEPS, October 2012, p9

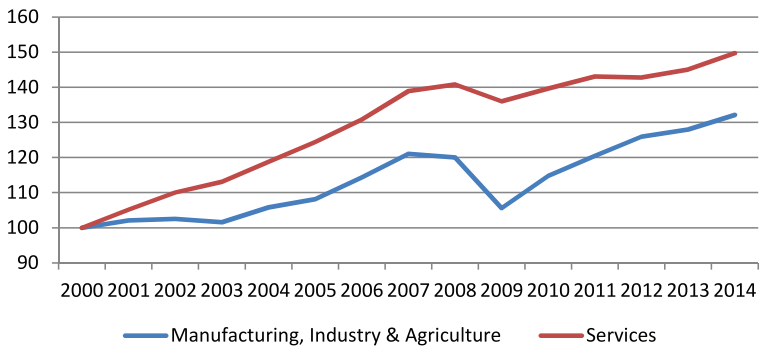
13 'Reallocation' refers to the labour productivity effects of labour switching between sectors. This varies across the time period and from country to country therefore an adjustment is needed for the EU aggregate. The figures in the table may not add up exactly due to rounding.

The EU, as a whole, has generally performed poorly in the most technology-intensive areas, such as the Internet, biotechnology, and computer software, compared to the US and the UK's individual performance in these new sectors. The EU has tended to do better in the more established manufacturing sectors, especially industrial machinery, electrical equipment, telecommunications, aerospace, automobiles, and personal goods.

However, services have increased in tradability due to new technologies that have changed the nature of many services from "traditional" to "modern." Traditional services often require face-to-face contact, while modern services can be delivered over longer distances. Modern services, such as banking and financial services, telecom support, and technical support, are now more "impersonal" and can be stored and traded digitally, thereby providing new opportunities to create employment and promote innovation.[14]

Since 2000, services have contributed more to EU gross value added (GVA) than the manufacturing sectors and this trend looks set to continue in the coming years. Therefore, the EU's competitiveness and productivity in these sectors is increasingly vital.

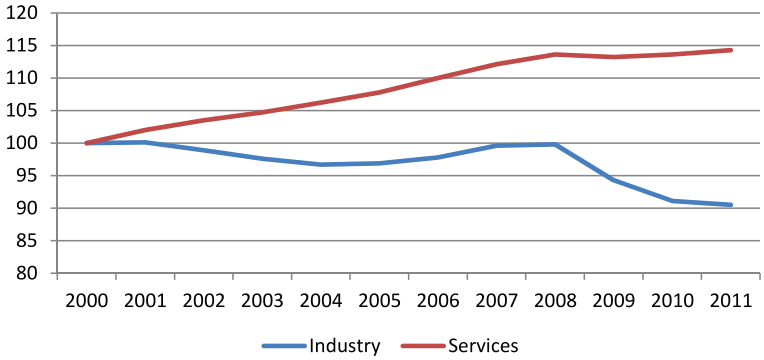
Graph 4: Sectoral EU Gross Value Added Index (2000-2014)



Source: Eurostat and Open Europe calculations[15]

Similarly, the graph below illustrates that, since 2000, the services sector has continued to create employment, while the industrial sector has remained relatively flat and, in recent years, shed jobs.

Graph 5: Sectoral contribution to EU Employment Index (2000 - 2011)



Source: Eurostat and Open Europe calculations

All these factors highlight the absolutely vital importance of services to the EU economy and underline why it is essential that the EU becomes more competitive in these sectors.

14 Open Europe, 'Trading Places: is EU membership still the best option for UK trade?', 2012, p19-20; http://www.openeurope.org.uk/Content/Documents/Pdfs/2012EUTrade.pdf

15 The figures for 2012 – 2014 are forecasts. To produce the forecast we use the Eurostat's forecasts for overall GVA and scale them to the services and manufacturing sectors assuming a share of GVA growth based on the average over the past decade. The share could of course change but we do not expect the gap between the two to close substantially over the next few years.

2. UNLOCKING THE EU'S GROWTH POTENTIAL IN SERVICES

2.1. The problem

The Services Directive hasn't fulfilled the EU's potential

For various reasons (see Annex I for background), services liberalisation at the EU level has proved difficult to achieve. The Services Directive, adopted in 2006, was subject to fierce political negotiation and the European Commission's proposal was heavily amended in the legislative process. As a result, the liberalising "country of origin principle" contained in the original proposal tabled by the Commission in 2004, was removed.

Instead, the adopted Directive states that, notwithstanding the limitations of "non-discrimination", "proportionality" and "necessity" laid out in the Directive, member states:

> *"Shall not be prevented from imposing requirements with regard to the provision of service activity, where they are justified for reasons of public policy, public security, public health or the protection of the environment…"*[16]

The result is that, although what is left of the original Directive obliges member states to liberalise their services sectors and has provided some economic benefits, there remains a great deal of ambiguity with regard to what barriers member states can keep in place. This ambiguity has often resulted in poor implementation across the EU, and requires constant policing by the European Commission and the European Court of Justice.

Despite these shortcomings in the current Directive, due to domestic politics and ideological preferences, some EU countries are likely to continue to block attempts to push through a new pro-competition Services Directive based on the "country of origin principle". In addition, the European Parliament, which was a driving force in watering down the original Services Directive, has shown few signs of changing its stance in recent years.

The number of regulated professions is a continued obstacle to services

In addition, barriers to the free movement of services can also be imposed by regulation governing the access to certain professions or particular service activities. The EU's Recognition of Professional Qualifications Directive was designed to facilitate the free movement of services by setting common rules for the recognition of professional qualifications, and therefore make it easier for professionals to establish or to provide services in another member state where a particular profession is regulated.

However, according to the European Commission, there are 800 different activities in the EU that are "considered to be regulated professions in one or more Member States and are reserved for providers with specific qualifications." The justification for regulating many of these professions seems weak given that "more than 25%" of the regulated professions in the EU are regulated in just one member state. Examples cited by the Commission are the services of photographers, barmen, corset makers or chambermaids.[17]

2.2. The solution

In February 2012, the UK, the Netherlands, Italy, Estonia, Latvia, Finland, Ireland, the Czech Republic, Slovakia, Spain, Sweden and Poland signed a 'pro-growth' letter, which read:

> *"Services now account for almost four fifths of our economy and yet there is much that needs to be done to open up services markets on the scale that is needed. We must act with urgency, nationally and at the European level, to remove the restrictions that hinder access and*

16 Article 16(3) of the Directive

17 European Commission, 'Towards a better functioning Single Market for services – building on the results of the mutual evaluation process of the Services Directive', 27 January 2011, p7; http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0020:FIN:EN:PDF

competition and to raise standards of implementation and enforcement to achieve mutual recognition across the Single Market."[18]

In addition to fully implementing the existing Services Directive, a like-minded group of EU member states such as this could use enhanced cooperation (see Box 1) to press ahead with a more ambitious approach to services liberalisation. Indeed, this was an idea floated by Mark Rutte, the Dutch Prime Minister, in 2011. Back then, he said that:

"We want to form a mini-Single Market for all the professional services, and then obviously the hope is that all 27 countries would like to join, even if some are currently vehemently opposed. I am absolutely convinced the Scandis, the Baltics and other countries will be willing to group together to have the original services directive implemented."[19]

One way of doing this would be to return to the principle of mutual recognition originally proposed in the Commission's draft Services Directive, and for the participating member states to agree amongst themselves to implement the "country of origin principle".

If the "country of origin principle" were adopted, it would mean that a service provider would only need to comply with the regulations of their home state and that member states could not restrict services supplied by a provider established in another member state. Based on the principle of mutual recognition, this would make EU cross-border trade in services far less burdensome without requiring regulatory harmonisation or the imposition of further regulatory obligations on firms that chose to supply services exclusively in their home country.

In general terms, it would also introduce greater 'market pressure' to liberalise, in addition to the 'government pressure' that exists under the current approach, as there would be greater and more open competition between different member states' services sectors. In turn, this would also place a greater emphasis on realising the benefits of increasing cross-border services trade and creating a genuine EU-wide services market.

In the area of regulated professions, enhanced cooperation should take the form of a political commitment to reduce the number of regulated professions by at least 15%. This would be both liberalising but also give the participating member states the flexibility to pick which professions to deregulate – allowing them to start with 'low hanging fruit'.

18 For full letter see Telegraph, 'David Cameron and EU leaders call for growth plan in Europe: full letter' 20 February 2012; http://www.telegraph.co.uk/finance/financialcrisis/9093478/David-Cameron-and-EU-leaders-callfor-growth-plan-in-Europe-full-letter.html

19 Guardian, 'Cameron looks to Dutch in move to boost EU free market' 25 January 2011, http://www.guardian.co.uk/politics/2011/jan/25/davidcameron-netherlands?INTCMP=SRCH

Box 1: What is enhanced cooperation?

Enhanced cooperation has been used only three times so far, once for trans-EU divorce law, once for European patent law and now for the FTT. It allows a minimum of nine countries that wish to continue to work more closely together to do so, while respecting the EU treaties. The Member States concerned can thereby move forward at different speeds and/or towards different goals.[20]

Conditions for enhanced cooperation

Enhanced cooperation should:

- aim to further the objectives of the EU, protect its interests, and reinforce its integration process;
- not undermine the internal market or economic, social and territorial cohesion;
- not constitute a barrier to or discrimination in trade between Member States or distort competition between them;
- respect competences, rights and obligations of non-participating Member States;
- only be adopted as a measure of last resort when it has been established that the objectives of such cooperation cannot be attained within a reasonable period by the Union.

Procedure for enhanced cooperation

Once the conditions for enhanced cooperation are met, the procedure is as follows:

- at least nine Member States must send a request to the European Commission specifying the scope and objectives;
- the Commission "may" submit a proposal to the Council to that effect, but if it does not do so it must explain why;
- authorisation to proceed with enhanced cooperation based on the Commission's proposal must be granted after obtaining the consent of the European Parliament and by the Council acting by a 'qualified majority';
- non-participating Member States must not impede its implementation;
- all Member States may participate in the Council's discussions but only Member States participating in the enhanced cooperation can vote (in respect of its implementation, either by QMV or by unanimity depending on the treaty base of the legislation in question);
- enhanced cooperation must be open at any time to all Member States.

2.3. Potential practical and legal obstacles to enhanced cooperation

The need to show that agreement at 27 isn't possible

In the three examples of enhanced cooperation to date, EU divorce law, an EU patent, and the FTT, enhanced cooperation proceeded after a proposal was discussed by the Council of Ministers and it was decided that agreement at the level of 27 member states was not possible.[21] However, if the Commission is broadly supportive of the idea, this hurdle could be overcome within a relatively short space of time. In principle, there should be sympathy for this proposal within the Commission given that it is a pro-Single Market measure (see below) which also involves more integration.

Would there be a qualified majority to authorise enhanced cooperation?

A small group of countries seeking to use enhanced cooperation for services might require the tacit approval of some non-participating states. Under the EU treaties[22] it is clear that the Council of Ministers

20 See Article 20 TEU and Articles 326 to 334 TFEU

21 See COUNCIL REGULATION (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation, COUNCIL DECISION of 10 March 2011 authorising enhanced cooperation in the area of the creation of unitary patent protection (2011/167/EU), and Proposal for a COUNCIL DECISION authorising enhanced cooperation in the area of financial transaction tax 23.10.2012 COM(2012) 631 final 2012/0298 (APP)

22 See Article 329 TFEU: "Authorisation to proceed with the enhanced cooperation referred to in the first subparagraph shall be granted by a decision of the Council, on a proposal from the Commission and after obtaining the consent of the European Parliament."

must authorise the use of enhanced cooperation by a Qualified Majority Vote (QMV). For instance, in the case of the FTT, the states wishing to proceed managed to gain a qualified majority, with the Czech Republic, Luxembourg, Malta and the UK abstaining.[23] In addition, the European Parliament could in theory block the actual launch of enhanced cooperation if a majority of MEPs vote against it (but once launched MEPs will have no say). However, given the economic benefits – and the constructive nature – of this proposal, it would be odd for member states and MEPs to seek to block it.

Could the "country of origin" principle conflict with the existing Services Directive or undermine the Single Market?

A key prerequisite for enhanced cooperation is that it doesn't undermine the Single Market. Enhanced cooperation on the EU patent was subject to legal challenge at the European Court of Justice. Italy and Spain contested a range of legal areas including whether the decision was in line with the Single Market, illustrating that a similar proposal, too, could be open to a legal challenge. But given the precedent that is being established by the patent and the FTT, it is unlikely that such a challenge would be successful.

The case regarding the patent is pending, but in his preliminary opinion[24] the ECJ Advocate-General Yves Bot argued that the patent,

> *"contributes to the harmonious development of the Union as a whole, since it has the consequence of reducing the existing disparities between those Member States."*

Similarly, in its proposal for an FTT, the Commission argued,

> *"Today's proposal states that enhanced cooperation on FTT would contribute to a stronger Single Market, with less barriers and competitive distortions. A common system of taxing the financial sector, even if not applied by all Member States, is preferable to the fragmentation that would result from 27 different national systems."*[25]

With the same logic, far from undermining the Single Market, enhanced cooperation in the Services Directive would reduce the overlapping services regulation, align the number and type of regulated professions, remove competitive distortions and reduce the significant barriers to services trade within the EU.

An argument might be made that the "country of origin" regime for services under enhanced cooperation could be in conflict with the existing Services Directive's rules, which essentially mean that a service provider must comply with the rules in the "country of destination". But for similar reasons to those discussed above this too seems unlikely.[26]

23 Council of the European Union 'Financial Transactions Tax: Council agrees to enhanced cooperation', 22 January 2013 http://register.consilium.europa.eu/pdf/en/13/st05/st05555.en13.pdf

24 Info Curia, Opinion of Advocate-General Bot, 11 December 2012, Joined Cases C-274/11 and C-295/11 Kingdom of Spain (C-274/11), Italian Republic (C-295/11) v Council of the European Union. http://curia.europa.eu/juris/document/document.jsf?text=&docid=131666&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=133168

25 Enhanced Cooperation on Financial Transaction Tax – Questions and Answers http://europa.eu/rapid/press-release_MEMO-12-799_en.htm

26 Even if so, one potential solution would be for the countries implementing the "country of origin" principle under enhanced cooperation to commit to also apply the principle to countries that haven't signed up. This would essentially mean that, under the principle of "unilateral free trade", the enhanced cooperation group would open their services markets up to the other member states which had chosen not to reciprocate by maintaining the existing Services Directive.

3. WHY IS THIS THE RIGHT TIME FOR ENHANCED COOPERATION?

There are several arguments for why this would be an appropriate time to table this type of proposal:

The economic case is overwhelming: Fundamentally, both in the short-term and long-term, Europe needs to explore all possible measures to boost growth and competitiveness. The eurozone is set for recession in 2013 but more worryingly, the EU is facing relative economic decline in global terms. The EU's share of world GDP is expected to be 60% of its 1990 level within five years. As we have noted, a lot of the growth potential in Europe lies in the services sector, and this would send a strong signal to the rest of the world – and indeed financial markets – that Europe is taking its challenges seriously. Therefore, there is an overwhelming economic case for not letting political obstacles in some member states stand in the way of what is a desperately needed boost to growth.

The eurozone crisis is driving liberalisation in individual countries: Lagging competitiveness is precisely the reason why the Commission, IMF and European Central Bank are pushing for the liberalisation of closed professions in Greece and Portugal (see Box 2). Structural reform and competitiveness have long featured heavily in summit communiqués but there is now some genuine momentum behind this agenda in several countries. It is the right time to capitalise on the change in the political climate (though growing popular resistance to 'austerity' has also undermined support for structural reforms to some extent).

A multi-tier Europe is already a reality: There is a school of thought that warns against more differentiated integration in the EU, on the grounds that it can lead to political and institutional fragmentation, therefore undermining the Single Market. While this concern needs to be taken seriously it is, in fact, fighting yesterday's battle. First, a multi-tier EU has been in existence for some time, with for example, the euro, Schengen and justice and home affairs being subject to differentiated participation. Secondly, the creation of an EU banking union, in particular, is further entrenching a multi-tier structure, whether we like or not – with the UK, Sweden, the Czech Republic and possibly others not taking part – despite the fact that the new construction has the potential to cut across the Single Market. Finally, as we noted, the FTT and the EU patent have already set a precedent. This is an acknowledgement that flexible integration should be embraced and not feared – particularly if it has the potential to generate such a massive boost to growth.

The more progress on reform, the less need for repatriation: For those who want the UK to stay in the EU, which includes most other countries in the EU, this would be the ideal opportunity to channel the frustration that exists in Britain into a constrictive, positive, pro-growth and – indeed – pro-European agenda. The more headway the UK can make in the traditional, pro-competitiveness areas such as Single Market liberalisation, the more credibility any future UK Government will have when making the case for continued EU membership. This, in turn, will reduce calls not only for the UK to leave the EU, but also for unilateral attempts to repatriate powers. It is a win-win.

Box 2: The growing momentum behind services liberalisation

Many aspects of our proposal on services are already being pursued in certain parts of the EU – notably the countries which have received bailouts (Greece, Ireland and Portugal). The European Commission, along with the IMF and the ECB, has strongly emphasised the need for further reform and liberalisation of the services market in these countries:

The Economic Adjustment Programme for Ireland, February 2011:

"Enhanced competition in the services sector modelled in the simulations…translates into a 0.1% increase in employment and a 0.5% increase in GDP over a 10-year period."

"[The Irish] Government will introduce legislative changes to remove restrictions to trade and competition in sheltered sectors including: [the legal profession, medical services and the pharmacy profession]".[27]

The Second Economic Adjustment Programme for Greece, December 2012:

"Highly regulated services markets for retailing, transport and professional services have for a long time limited competition and increased costs for exporters."

"To foster competitiveness…services markets need to be comprehensively reformed by removing the remaining unnecessary restrictions and barriers to entry that currently impede competition and price adjustment. In many areas, such as business environment, energy, transport, retail trade and regulated professions, ambitious reforms have been designed and implemented."[28]

At least 16 of the 72 'prior actions' which Greece must complete under the Second Economic Adjustment programme in order to access funding relate to improving the services sector – this is larger than any other area, even fiscal consolidation.

The Economic Adjustment Programme for Portugal, June 2011:

"Portugal has a number of sheltered sectors, notably in services and network industries, which are marked by excess profits…Removing distortions in non-tradable sectors (notably services), will be key in promoting competitiveness adjustment."

"Beyond the mandatory provisions of the Services Directive, the limits to exercising regulated professions (such as accountants, auditors, lawyers and pharmacists) will be reviewed."

"The Programme includes several measures to facilitate the ease of doing business, including the extension of 'Points of Single Contact' to services not covered by the Service Directive."[29]

Importantly, in Portugal, the Troika (and therefore the Commission) has already actively pushed for services reform to go further than required under the Services Directive.

27 European Commission, 'The Economic Adjustment Programme for Ireland', Occasional Papers 76, February 2011 http://ec.europa.eu/economy_finance/publications/occasional_paper/2011/op76_en.htm

28 European Commission, 'The Second Economic Adjustment Programme for Greece', Occasional Papers 123, December 2012 http://ec.europa.eu/economy_finance/publications/occasional_paper/2012/pdf/ocp123_en.pdf29 See Open Europe, 'Off target: The case for bringing regional policy back home', 2012; http://www.openeurope.org.uk/Content/Documents/Pdfs/2012EUstructuralfunds.pdf

29 European Commission, 'The Economic Adjustment Programme for Portugal', June 2011.

3.1. What are the potential political drawbacks?

The worry for non-eurozone countries in particular is that such a proposal could open a Pandora's box, whereby the eurozone might begin to use enhanced cooperation to create a two-tier Single Market. Under the new voting rules of the Lisbon Treaty, the eurozone has an inbuilt qualified majority in the Council of Ministers[30] so could always push enhanced cooperation through.

This risk needs to be considered carefully, but has probably been overstated. Firstly, as we saw with the proposal for an FTT (primarily a eurozone initiative), countries inside the single currency have already started down this road, and indeed moved first. However, the fact that not all eurozone countries managed to agree to the FTT, with Ireland, Luxembourg and the Netherlands remaining outside, also shows that the eurozone is still far from constituting a cohesive block. Likewise, there are also significant differences of opinion within the eurozone on issues such as banking union, debt pooling and the role of the ECB. It is therefore unlikely that a eurozone block would launch a barrage of enhanced cooperation initiatives – at least in the near future.

Some governments may also feel uncomfortable about 'giving up' on achieving services liberalisation at the level of all 27 states, and missing out on future possible levers to push it through. In particular, the appointment of a new Commission in the autumn of 2014 could provide an opportunity for reform-minded governments to seek specific portfolios and prioritise services liberalisation in the next Commission's term. However, successful liberalisation via enhanced cooperation could serve as a springboard to get all 27 countries on board at a later stage.

Box 3: What's in it for Germany?

Germany has traditionally been considered reluctant to throw its weight behind greater services liberalisation, due its strong competitive advantage in manufacturing and comparatively tightly regulated professions. Getting Germany on-board would also generate the greatest proportionate benefit, by far. This proposal would offer three compelling reasons for Germany to give its support:

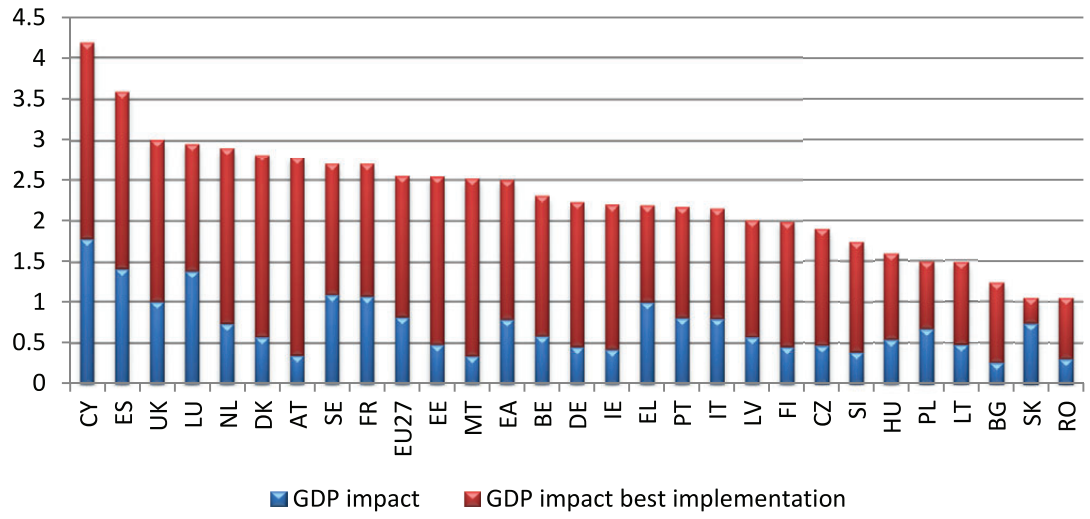
1. It would be a positive, constructive, and pro-European means by which to secure continued UK engagement in the EU, which remains very important for Berlin.
2. It would provide a new legal framework to improve competitiveness and growth in the Southern euro member states and therefore boost the economic prospects of the eurozone, but without an extra cent of German taxpayers' money.
3. It would improve EU-wide growth, competitiveness and employment.

30 See Open Europe, 'Continental shift: safeguarding the UK's financial trade in a changing Europe', December 2011, p22; http://www.openeurope.org.uk/Content/Documents/Pdfs/continentalshift.pdf

4. WHAT ARE THE ECONOMIC BENEFITS OF GREATER LIBERALISATION?

The graph below highlights the estimated impact of the Services Directive so far (blue bars). It also shows, according to European Commission estimates, how much more could be gained (red bars) if the Directive was implemented in all member states to the 'best-practice' level seen in the five most liberalised member states.

Graph 6: GDP impact of further implementation of the Services Directive (%)



Source: European Commission, First Assessment of economic impact of the Services Directive, June 2012

The Commission estimates that the Services Directive has already led to benefits of €101bn (0.8% of EU GDP). Previous economic studies estimate that the benefits of further liberalisation under the Services Directive for the EU as a whole are a boost to EU GDP of between 0.55% (€69.5bn) and 1.81% (€228.8bn) a year. They estimate that the country of origin principle is worth between an extra 0.1% (€12.6bn) and 0.5% (€63.2bn) to EU GDP a year.[31] As we argue above, introducing the country of origin principle could increase the market pressure to liberalise and existing studies are likely to have underestimated the potential benefits to cross-border trade. In total, the permanent benefit to the EU as a whole could be between 0.65% (€82.2bn) to 2.31% (€294.1bn) of GDP in addition to the gains already achieved.

The Commission has previously estimated total economic gains from full implementation of the original Services Directive of €330bn (this figure refers to total gains compared to before the Directive was introduced, whereas our figure refers to additional gains over existing levels of implementation).[32]

Open Europe has scaled these estimates, based on the size of individual countries' services sectors, (see Annex II for methodology and literature review) to three potential groups of EU member states operating under enhanced cooperation, with the following results:

Enhanced Cooperation group 1: The UK, Netherlands, Italy, Estonia, Latvia, Finland, Ireland, Czech Republic, Slovakia, Spain, Sweden and Poland – all of which signed pro-growth letter in February 2012.
Total benefit: 0.33% to 1.17% boost to EU GDP (€41.6bn to €147.8bn a year)

Enhanced Cooperation group 2: As above minus Spain and Italy.
Total benefit: 0.19% to 0.67% boost to EU GDP (€23.9bn to €85.1bn a year)

31 See Annex II for a full methodology and literature review which details our calculations.

32 European Commission, 'The economic impact of the Services Directive: A first assessment following implementation', June 2012, p34. The figure is represented as 2.6% of EU GDP, which in 2011 was €330bn.

Enhanced Cooperation group 3: Group 2 plus Germany, Austria, Denmark, Portugal and Luxembourg. Total benefit: 0.35% to 1.25% boost to EU GDP (€44.5bn to €158bn a year)

Table 2: The economic benefits of greater services (% of GDP and €bn)								
2011 prices	EU-wide		Enhanced Coop group 1		Enhanced Coop group 2		Enhanced Coop group 3	
	% of EU GDP	€bn	% of EU GDP	€bn	% of EU GDP	€bn	% of EU GDP	€bn
Benefits of further implementation of Services Directive	0.55% - 1.81%	69.5 - 228.8	0.28% - 0.92%	35.2 - 115.9	0.16% - 0.52%	20.3 - 66.7	0.30% - 0.98%	37.6 - 123.8
Country of origin principle	0.1% - 0.5%	12.6 - 63.2	0.05% - 0.25%	6.4 - 32	0.03% - 0.14%	3.7 - 18.4	0.05% - 0.27%	6.8 - 34.2
Total	0.65% - 2.31%	82.2 - 294.1	0.33% - 1.17%	41.6 - 147.8	0.19% - 0.67%	23.9 - 85.1	0.35% - 1.25%	44.5 - 158

These groups are fluid and a range of combinations are possible but the figures nonetheless illustrate the massive benefits of any successful attempt at enhanced cooperation in this area.

4.1. How does services liberalisation compare to other proposals aimed at boosting growth?

The benefits of fully implementing the Services Directive and introducing the country of origin principle dwarf other measures put forward at the EU level to promote growth.

For example, in June 2012, the EU agreed on a "compact for jobs and growth",[33] hailed by some (including French President Francois Hollande and Italian Prime Minister Mario Monti) as essential to kick-starting growth across the EU – though most of the cash came from unused structural funds whose actual impact on growth is contested.[34] It also called for a deepening of the Single Market, but as of yet no clear proposals have been put forward on this front. The table below compares the likely impact of services liberalisation with that of some existing measures.

Table 3: Services liberalisation compared with other proposals aimed at boosting growth				
2011 prices	OE Services proposal (EU wide)	Increased EIB Lending capacity	Project bonds	Annual EU budget spending on Structural Funds
Total benefit (% 2011 EU GDP)	0.65% - 2.31%	0.47%	0.04%	0.40%
Total benefit (€ bn)	82.2 - 294.1	60	4.5	50.6

33 EU compact for jobs and growth amounted to €120bn, divided as follows: increased EIB lending capacity - €60bn (€10bn of capital); Project bond - €4.5bn; Reallocated Structural funds - €55bn

34 See Open Europe, 'Off target: The case for bringing regional policy back home', 2012; http://www.openeurope.org.uk/Content/Documents/Pdfs/2012EUstructuralfunds.pdf

ANNEX I: WHY HAVEN'T THE EXISTING RULES FULFILLED THE POTENTIAL OF THE SINGLE MARKET FOR SERVICES?

Developing and liberalising trade in services is far more complex than trade in goods, and is contingent on a number of factors, often requiring the movement of people across borders, ease of establishment in another state, and comparable regulation between home and host state to create a level playing field. Many of these factors are inherently 'domestic' and greater liberalisation of services within the EU Single Market has therefore often faced political opposition in many of the member states and in the European Parliament.

Services are subject to many different national and EU regulatory instruments. Some important sectors are excluded from the Services Directive, such as financial, telecommunications, transport services and healthcare, but most of them covered by other EU internal market legislation.[35] In addition, the Posted Workers Directive established a legal framework for businesses to send workers from their home member state to another host member state in order to provide a service for a limited period of time. The Directive seeks to facilitate the provision of cross-border services whilst also ensuring a minimum level of protection for posted workers.[36] Finally, the EU's Mutual Recognition of Professional Qualifications Directive, governs the right of certain professionals, such as doctors and architects, to practice in other member states and is seen as complementary to the Services Directive.

The Services Directive has not fulfilled its potential

The aim of the Services Directive was to make it easier for service providers to exercise freedom of establishment in another member state and facilitate the free movement of services throughout the EU. The temporary provision of services is traditional cross-border trade i.e. situations where either the service company or the customer travels to the other's country. Establishment refers to services sold through the service company being established in the country where the services are to be sold.

Freedom of establishment

The current Directive aims to make it easier for service providers to establish themselves in another EU country by requiring member states to establish "Points of Single Contact", one-stop shops where service providers can obtain all relevant information and complete all procedures relating to their activities, and to ensure that all these procedures and formalities can be completed at a distance and by electronic means.[37] It also requires member states to abolish discriminatory authorisation schemes or requirements, such as nationality or residence requirements, the involvement of competitors in authorisation decisions, or "economic needs" tests, where businesses have to prove that there is a demand for their services.[38]

The Directive also compels member states to assess the compatibility of their legal systems with the conditions regarding non-discrimination in the Directive. However, some requirements can be retained if they are "justified by an overriding reason relating to the public interest."[39]

Free movement of services

In the adopted Services Directive, the basis on which services may be provided temporarily or occasionally without establishment in another member state changed from the country of origin principle originally proposed by the Commission to a 'country of destination' principle. If the former had been adopted, it would have meant that a service provider would only need to comply with the regulations of their home state and that member states could not restrict services supplied by a provider established in another member state. Based on the principle of mutual recognition, this was intended to make EU cross-border trade in services less burdensome without requiring regulatory harmonisation or the imposition of further regulatory obligations on firms that chose to supply services exclusively in their home country.

35 European Commission, 'The economic impact of the Services Directive: A first assessment following implementation', June 2012, p6
36 http://www.publications.parliament.uk/pa/cm201213/cmselect/cmeuleg/86i/8603.htm
37 Articles 5-8 of the Directive
38 Articles 9-14 of the Directive
39 Article 15(3) of the Directive

Instead, the final legislation says that, notwithstanding the limitations of "non-discrimination", "proportionality" and "necessity" laid out in the Directive, member states "shall not be prevented from imposing requirements with regard to the provision of service activity, where they are justified for reasons of public policy, public security, public health or the protection of the environment…"[40]

Some particularly prohibitive restrictions are banned, such as the requirement to set up an office, but this loophole creates opportunities or excuses for member states to keep barriers in place. At the very least, it creates ambiguity that has to be policed by the European Commission and the ECJ.

In 2006, the Federation of Small Business told the House of Lords EU Select Committee that the benefits of temporary operations had largely been lost in the new draft and that although it would "make [the provision of services across Member State borders] easier" it would not "entice people to do it, that would have been a major bonus from a small business point of view. That is not the case anymore." The Confederation of British Industry suggested that the Directive left something of a "grey area" where "Member States could argue that they have directed a specific kind of requirement which is, in essence a barrier" and that this barrier "still exists even though perhaps it has been reduced."[41] As the 2012 European Commission report noted, "the Directive left some room to Member States when deciding which existing regulation was incompatible with the provisions of the Directive."[42]

What practical barriers to services trade and growth remain?

A 2011 'peer-review' of the Services Directive, whereby member states challenged each other on the regulatory requirements they had retained despite the Services Directive, reported more than 34,000 requirements still in force.[43] A follow-up report published in June 2012, which focused on the business services, construction, real estate, retail and tourism sectors, detailed the progress made but also some of the specific barriers that remain in place.[44]

Discriminatory barriers based on nationality or residence

Despite the Services Directive, requirements based on nationality or residence are still applied in some member states, i.e. regulations stating that a service provider has to be a national of the country or be resident in the country to start a business or, in the case of a company, that its registered office has to be located in the Member State in order to trade. For example:

- In **Austria**, the nationality requirement for chimney sweeps has been removed, but a residence requirement still applies.
- In **Cyprus**, both natural and legal persons working in the real estate sector must have a registered office or place of business in the country.
- Residence requirements for ski instructors remain in place in **Italy**.

Economic needs tests

Despite being banned by the Directive, so-called 'economic needs tests' – the obligation for service providers to prove the existence of an economic need or market demand, or to assess the potential or current economic effect of their activity for instance on competitors, are still in force in some member states. These costly and time-consuming exercises generally hinder or severely delay the establishment of newcomers. For example:

- In **Austria**, an economic needs test has to be carried out before the relocation of a tobacco shop can be authorised.
- In **Greece**, the authorisation for open air casual trading is linked to an economic test connected with the opinion of a committee involving potential competitors.

40 Article 16(3) of the Directive
41 House of Lords EU Select Committee, 'The Services Directive Revisited', 24 July 2006, p17; http://www.publications.parliament.uk/pa/ld200506/ldselect/ldeucom/215/215.pdf
42 European Commission, 'The economic impact of the Services Directive: A first assessment following implementation', June 2012, p2; http://ec.europa.eu/economy_finance/publications/economic_paper/2012/pdf/ecp_456_en.pdf
43 European Commission, 'On the process of mutual evaluation of the Services Directive', SEC(2011) 102, 27 January 2011, p9
44 European Commission, 'Detailed information on the implementation of Directive 2006/123/EC on services in the internal market', SWD(2012) 148, 8 June 2012, Chapter III

Involvement of competing operators in the decisions of regulators

The direct or indirect involvement of competitors, including within consultative bodies, in the granting of individual authorisation or in the decisions of regulators is forbidden by Article 14(6) of the Services Directive. The involvement of competitors in an individual decision, for instance an authorisation, goes against the basic goal of favouring the market entry of newcomers. For example:

- In **Sweden**, lawyers already established in Sweden have to confirm the good reputation of candidate lawyers wanting to establish themselves in Sweden.
- In **France**, committees granting authorisation to those organising and managing events include competitors.
- In **Germany**, boards consisting partly of competing operators still have to confirm to the competent authority that an applicant company in the field of structural inspection engineering fulfils all the necessary application requirements for being authorised.

Obligations to apply fixed, minimum or maximum tariffs

Several member states have maintained fixed tariffs in the professional services sector. For example:

- **Bulgaria** (lawyers, architects, engineers in investment design, cartographers and cadastre service providers, veterinarians)
- **Cyprus** (lawyers)
- **Germany** (veterinarians, insolvency administrators, architects, engineers)
- **Poland** (lawyers and patent agents)
- **Slovakia** (insolvency administrators)
- **Slovenia** (lawyers, insolvency practitioners)
- **Sweden** (professional housing agents)

Regulated professions

Barriers to free movement of services can also be imposed by the regulation of people qualified to provide certain professional services. The EU's Recognition of Professional Qualifications Directive was designed to facilitate the free movement of services by setting common rules for the recognition of professional qualifications, and therefore making it easier for professionals to establish or to provide services in another member state where a particular profession is regulated.

Member States can have valid reasons for regulating professions in different ways. For example, some countries regulate the construction of buildings and others regulate the people constructing houses. However, more often than not, the impact of this national regulation on cross-border trade is not considered. The mutual evaluation process for the Services Directive, also frequently raised the issue of barriers among regulated professions.[45]

- According to the European Commission, there are 800 different activities in the EU that are "considered to be regulated professions in one or more Member States and are reserved for providers with specific qualifications."
- Meanwhile, the justification for regulating many of these professions seems weak given that "more than 25%" of the regulated professions in the EU are regulated in just one member state. Examples cited by the Commission are the services of "photographers, barmen, corset makers or chambermaids."[46]
- An evaluation of "reserved activities" in 13 member states, carried out on behalf of the Commission[47], found that "There was a range from a high of 55 regulated professions in Germany to a low of 16 in Finland". The study noted that, "there was strong recourse to the use of exclusive reserves of activities in southern EU countries (Greece, Italy and Spain) and in the new member states (Czech Republic, Slovenia and Poland)."[48]

45 European Commission, 'On the process of mutual evaluation of the Services Directive', SEC(2011) 102, 27 January 2011

46 European Commission, 'Towards a better functioning Single Market for services – building on the results of the mutual evaluation process of the Services Directive', 27 January 2011, p7; http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0020:FIN:EN:PDF

47 Centre for Strategy & Evaluation Services, 'Study to Provide an Inventory of Reserves of Activities linked to Professional Qualifications Requirements in 13 EU Member States & Assessing their Economic Impact: Executive summary', January 2012; http://ec.europa.eu/internal_market/qualifications/docs/news/20120214-summary_en.pdf

48 In contrast, countries such as Denmark, Finland, the Netherlands and the UK had "low numbers of exclusive reserves of activities". The report suggested that "This reflected a greater tendency towards the use of alternative means of regulating the market, such as through reserved professional titles overseen by professional associations and licensing schemes." See Centre for Strategy & Evaluation Services, 'Study to Provide anInventory of Reserves of Activities linked to Professional Qualifications Requirements in 13 EU Member States & Assessing their Economic Impact: Executive summary', January 2012, p3; http://ec.europa.eu/internal_market/qualifications/docs/news/20120214-summary_en.pdf

In December 2011, the European Commission tabled a proposal to amend the Directive, currently under negotiation between national governments and the European Parliament, which would oblige member states to notify the Commission with a list of regulated professions and examine whether their national requirements are discriminatory, justified in the public interest and proportionate. Member states would then need to justify their regulatory requirements to the Commission.[49]

ANNEX II: METHODOLOGY FOR CALCULATING BENEFITS OF ENHANCED COOPERATION AND ECONOMIC LITERATURE REVIEW

Methodology

To calculate the benefits of further implementation we took the European Commission's estimates from summer 2012 and applied them to 2011 GDP. The range estimate for completing the implantation of the Services Directive is between 0.4% and 1.6% (see literature review). The benefit for improving the Point of Single Contact is estimated at between 0.15% and 0.21%. We combined these to get the potential overall additional effects. We also incorporate a number of earlier studies, however, most of these estimates fall within the range cited above (see literature review below).

For the enhanced cooperation group we weight this by the size of service sector (as % of GDP) of those economies involved, since the larger the service sector the more likely it is to boost the level of overall EU growth. This is admittedly not perfect since some countries may have much larger benefits but given that the magnitudes are fairly small in GDP terms this should not make too much difference. It also stops small countries with very large growth rates distorting the share.

To work out the benefits of including the country of origin principle we looked at the original estimates. They are varied and the actual impact even without the country of origin has been above what was expected. We took a range from the literature and followed the same process as above. The share of GDP here refers to their expected share of the overall EU benefits, which is essentially a scaling exercise.

Literature review

In a 2005 study on the potential economic benefit of the Services Directive, Copenhagen Economics suggested it could lead to an economy-wide increase of employment of around 600,000 (0.3%) and a GDP boost of 0.6%. According to the study the provisions relating to the Country of Origin Principle (CoOP) account for around 7-9% (€2-4 billion p.a. across the EU) of the welfare gains for the EU.[50]

In 2006 a study by the Netherlands Bureau for Economic Policy Analysis (CPB) suggested the Services Directive could result in an increase to GDP of 0.4% to 1.5% in the long run (by 2040).[51]

Kox et al., in their 2004 paper, estimated the effects of heterogeneity on bilateral intra-EU trade and intra-EU FDI in services. The main finding of the study was that commercial services trade in the EU (intra-EU flows) could increase by 30 to 60% while the foreign direct investment stock in services might rise by 20 to 35%.[52]

Gelauff and Lejour, in a report for the DG of Enterprise in 2006, as well as De Bruijn et al. (2006, 2008) estimated the Services Directive could increase total intra-EU trade by between 2% and 5%. They also estimated that GDP could rise by 0.3% to 0.7%. The results of these studies were considered as a lower bound given that the model used did not include FDI flows and lacked economies of scale. A latter study by Lejour et al. (2007, 2008), which focused on the effect of the Services Directive via FDI flows, found that FDI in services could increase by between 20% and 35%. As a result GDP in the EU25 could increase by between 0.4% and 0.8%. Combining the FDI and trade effects gives a total GDP effect ranging between 0.4% and 1.5%.[53]

49 Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Directive 2005/36/EC on the recognition of professional qualifications and Regulation on administrative cooperation through the Internal Market Information System, Article 59; http://ec.europa.eu/internal_market/qualifications/docs/policy_developments/modernising/COM2011_883_en.pdf

50 Much of the literature review is built upon the excellent review compiled by the European Commission in its First Review of the Services Directive. See Copenhagen Economics, 'Economic assessment of the barriers to the internal market for Services', 2005.

51 De Brujin, R., H. Kox and A. Lejour , 'The trade induced effects of the Services Directive and the country of origin principle', CPB Document 108, 2006.

52 Kox, H., A. Lejour and R. Montizaan, 'The free movement of services within the EU', CPB Document 69, 2004.

53 Gelouff, G., and A. Lejour, 'The new Lisbon Strategy: An estimation of the impact of reaching five Lisbon targets', Industrial Policy and Economic Reform Papers 1, DG Enterprise and Industry, 2006.

De Bruijn et al. also calculated the impact of excluding the CoOP, which accounted for about a third of the trade-effects of the Services Directive: intra-EU services trade could increase by 20 to 40%. Without the principle the GDP increase would be between 0.2% and 0.4% (compared to between 0.3% and 0.7%).[54]

In a 2008 study Badinger et al. estimated the effects of eliminating the CoOP. Under the assumption that the watering down of the original Services Directive would reduce liberalisation effects by one-third, the proportionate reduction of the macroeconomic effects was expected, accordingly the increase of GDP would go down to 1% from 1.5%.[55]

European Commission First Assessment of the economic impact of the Services Directive[56]

The conservatively estimated EU-level impact on GDP is 0.8%, with the impact varying considerably across Member States (ranging from below 0.3% to more than 1.5%) and mainly determined by the combination of the undertaken barrier reduction and the share of the covered sectors in their economies. Although the results materialise over time, close to 80% of the gains are reaped within the first five years following the policy shock (barrier reduction from implementation). An important finding of the analysis refers to the importance of the domestic channel of transmission, neglected in previous studies and that however turns out to yield very significant productivity results.

Under an ambitious scenario where Member States move to the level of restrictions of the five best countries in the EU per sector, which is de facto close to a full elimination of barriers, will bring additional gains amounting to 1.6% of GDP, on top of the 0.8% under the current level of implementation. Even under a moderately ambitious scenario – where each country would become an "ideal country" composed of sectors with an EU average level of barriers – the further additional gain reaches 0.4% of GDP on top of the 0.8%. An important element to highlight from this exercise is that further gains could be obtained still within the scope of the Directive both in terms of requirements and sectoral coverage.

The findings indicate that, on average, the already achieved economy-wide impact is 0.13% of GDP, and the predicted additional impact from further streamlining could reach 0.15% of GDP in the medium run and 0.21% of GDP in the long run. This suggests that the Member States could reap significant additional gains by pursuing tangible improvements in the PSC implementation, first and foremost its effective capability to benefit all the involved businesses.

54 De Brujin, R., H. Kox and A. Lejour, 'Economic benefits of an Integrated European Market for Services', Journal of Policy Modelling 30(2), 2008, 301-319.

55 Badinger, H., F. Breuss, P. Schuster and R. Sellner, 'Macroeconomic effects of the Services Directive', Published in 'Services Liberalisation in the Internal Market', F.Breuss, G. Fink, St. Griller (eds.), ECSA Austria Publication Series, Vol. 6. Springer, 2008.

56 European Commission, 'The economic impact of the Services Directive: A first assessment following implementation', June 2012.

Review of the balance of competences
Market integration and the Internal Market

This submission is made on a personal capacity but informed by the work being undertaken in Scotland by my employer the Convention of Scottish Local Authorities (COSLA) and draws from expertise gathered through our work with the individual Councils. I also happen to work closely with our European umbrella organisation the Council of European Municipalities and Regions (CEMR) therefore there are abundant references in the below submission that reflect the debate and exchanges with our counterparts from other countries, particularly in issues such as the recent Procurement Reform, State Aid and Treaty reform. Where appropriate links to all this is previous work is provided below.

Main reason for sending this way rather than as a formal COSLA submission is due to the fact that while considerable work was undertaken in preparation for this review, including attendance to a number of workshops BIS organised in London, Brussels and Scotland there was simply no material time to seek political endorsement of this very vast ranging topic, the more so as we were also responding to five other Balance of Competence reviews also ending this week. By contrast, there was a formal COSLA submission to the Internal Market consultation during the first batch of the Balance of Competence review last year.

Furthermore while this review is a welcome exercise to think the subject of this review out-of-the-box and long-term , it also has a direct bearing in the ongoing discussions in Scotland on some of the issues concerning with the Internal Market part of the inquiry. Thus as to avoid any misunderstanding any quote from the below submission should be unattributed.

The below submission provides nevertheless a quite diverse set of arguments that have been gathered in domestic and European discussions, often challenging some established assumptions and this reflecting the discursive, open ended and root review nature of the Balance of Competence inquiry.

Serafin Pazos-Vidal

1. What are the essential elements of an Internal Market and against what criteria should we judge its economic benefits? How deep does it need to be to be effective?

Main principles

- EU involvement should take place not only when it has clear EU Treaty competence (principle of Conferral) , but also *only when* its actions can provide real EU added value;

- Local government strongly defents the **subsidiarity principle** whereby “the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level” as well as the principle of proportionality and looks forward to participate in the Subsidiarity Early Warning Mechanism with the Scottish Parliament and the Committee of the Regions as well as calling on the European Commission to establish robust mechanisms of pre-legislative consultation to local stakeholders in matters that affect them directly.

- Therefore EU law, and the actions on by the European Commission should fully abide with Protocol 26 of the Lisbon Treaty on Services of General Economic Interest, whereby the Commission, it is role of watchdog of the EU Internal Market it should fully *respect “the essential role and the wide discretion of national, regional and local authorities in providing, commissioning and organising services of general economic interest as closely as possible to the needs of the users”* in any European Commission forthcoming initiative as regards to public services provision and its relationship with EU Competition law.

- The role of the European Commission as guardian of the Internal Market should be respected. However it is very much open to question the prevailing view in some parts of the Commission that potential economic benefits can be put as an argument that override

basic principle of allocation of competences such as the conferral, subsidiarity and proportionality principles upon which EU Treaty Law is based.

Detail
The Commission wants to table an Internal Market-related legislation it often foresees a certain economic benefit. For instance in its evaluation of the current public procurement directive models calculate an scenario of savings of 5% of contract prices could therefore translate into increases in EU employment and EU GDP of between 0.08 and 0.12% after one decade (160-240 000 jobs EU-wide). Even in these difficult times that does not know amount to much on an EU wide scale if at the same time there are regulatory burdens and additional capacity constraints on public authorities.

On that latter issue it is worth noting that the Commission is often overtly optimistic on the regulatory impact of its proposals, particularly at government levels under central government level. This is partly due to the fact that most of the ex-ante impact assessments carried out by the Commission are contracted-out surveys that tend to be self-selective in the evidence they gathered. Indeed it is often down to organisations such as COSLA to proactively approach the researchers or the Commission itself to provide an assessment of the impact at local level.

2. To what extent is EU action in other areas – for example, environment, social, employment – necessary for the operation of the Internal Market, as opposed to desirable in its own right?

The Commission´s view that any proposal in those other areas can be argued using Internal Market powers is highly debatable. It is at the very least quite a disingenuous position by the Commission to resort to Internal Market whenever it feels that it does not have sufficient chances of success arguing for a new proposal using the Treaty powers on environment or social issues, as Internal Market route is the area where the Commission powers are much more wide ranging. Indeed this was the case particularly in previous EU Treaties as the EU powers in sector-specific policies were less defined compared to Internal Market, which has always been at the core of the EU a power.

- A key example for that is the forthcoming legislation on **Urban Mobility**. As the Commission does not have powers whatsoever in local planning it is arguing the creation of uniform rules on urban mobility using their vast powers on Internal Market. Local Government advocates have been making representations to Government against using the pretext of an alleged economic gain to what amounts to a clear expansion of EU powers by diverted means.

- The same could be said as regards to **social legislation** that it is often argued in terms of freedom of movement of workers when in reality it is legislating in minutiae detail not just the posted or cross-border workers (to which there could be a justification up to a point) but any type of work relationship, such as it is the case in the Working Time Directive.

- **Use of Procurement to deliver EU goals, including use of life cycle award criteria** The Commission continues to use its control of EU procurement rules to compensate for its limited powers in other of EU powers, and by the fact that the EU Budget is so small compared to the ambitious Europe2020 goals. This is why over the years it has used procurement to force Member States and local and regional bodies to use procurement to buy the greener, socially responsible objectives, and has certainly been the case in the new Public Procurement Directive currently in negotiation. Clearly this is an abuse, or at the very least, a creative expansion, of EU powers on Internal Market. Furthermore in spite of a new landmark Directive on Public Procurement, currently in negotiation, the Commission does continue to table separate procurement provisions in seemingly unrelated pieces of legislation (for instance, in legislation about energy efficiency of appliances, or housing standards). This disperse use of procurement powers creates legal uncertainty and is a challenge for local authorities to monitor let alone comply with these procurement obligations.

In our view the reason for EU action must be based on the conferral principle. The Lisbon Treaty has the merit of bringing real clarity on what are the areas in which the EU has powers and how far (exclusive, shared, supporting competence) these powers go. Therefore if a new proposal by the Commission is to be made it should rest on the relevant powers that have been attributed to the EU for that subject matter alone. In other words we do not consider that the Commission has a robust legal argument in the Commission claims that, for instance, the regulation of employment standards (such as working time) by Local Authorities can be argued in terms of improvement the free movement of workers across the Internal Market. If it is a social issue it should be tabled, and argued using the powers explicitly conferred by the EU Treaties. Equally the Commission, when aiming at proposing new EU legislation for a new sector it often argues the need for EU legislation on the basis of a market or even "the possibility of a market" even if such market is so local that it would not deserve consideration of EU rules.

The operation of the Internal Market

3. How have the EU's mechanisms for delivering an Internal Market worked? In particular, what do you believe is the right balance between harmonisation and mutual recognition? What evidence is there that harmonisation has worked well or badly? What are your views on the scope and effect of the EU's powers under Articles 114 and the use of Article 115 for non-tax measures?

4. Why is the Internal Market so much deeper in some areas than others? How effective has implementation of the Internal Market been, and what do you feel has helped or hindered implementation of Internal Market rules?

Answers to questions 3 and 4

On this regard we tend to agree with the Commission that the different nature of specific economic sectors, and notably within the services sector results in their relevance for EU law changing over time. Telecommunications (formerly state owned and regulated, became privatised with Intra-EU players due to technological change) is the classic example.
However what we clearly disagree with is whether Internal Market should also cover local public services, known in EU law as Services of General Interest, or more commonly Services of General Economic Interest. Indeed the distinction between SGI and SGEI is crucial as regards to their relevance for EU Internal Market, as the later are considered liable to EU internal marked rules whereas the former are considered exempt from EU interference. This is particularly a problem in the UK as due to the lack of a written constitution (or more exactly the non-existence of a single constitutional legal source) and the lack of constitutional recognition for Local Government makes it very difficult to argue protection from EU law to most local powers.

For instance recent research I undertook for the Scottish Government showed that the statutory instruments that conferred some power to the Scottish Councils runs a list of several hundred pieces of legislation. So contrary to other countries where their constitutions list what are the public services to be provided by local government and thus exempt from EU legislation can be used against attempts this is not something that is possible to do in the Scottish/UK legal context.
At the same time, when applying the below criteria due to the evolution of provision of services in the UK over the last thirty years we have found that the majority of public services provided by local government are indeed falling under EU Internal Market rules.

SGI	SGEI
It is defined by law, constitution as State/Public Sector Functions	Law defines public sector obligations
It is not open to private competition	It can be open to public sector participation (£1 of private investment enough)
The public sector provides most of the financing of the service.	Private providers can be compensated for providing SGEI according to previously defined, objective criteria
The public sector does not seek to obtain a profit	Such compensation to private providers may make them generate a profit
Not open to procurement or private tendering	Private provides must be selected according to a transparent public procurement procedure(i.e. CCT)

Clearly such a situation cannot be justified. Even accounting for the fact that Scottish local authorities are the largest on average of the EU it cannot be possible that the vast majority of Scottish local government public services are subject to EU Internal Market rules just because there is no constitutional protection for Local Government
Even if the Commission then may decide to set minimum thresholds under with Councils are exempted (as it happens in State Aid or Procurement, for instance) it remains questionable that Local Government powers are subject to EU interference even when they do not have any EU-wide repercussion.
It should be fully be recognised that it is very difficult to define when a service, a procurement activity or a subsidy is “intrinsically local”. However in spite of that this is not a sufficient argument not to define it where possible.
For instance, the idea of *"buying local*" something that it is politically welcome by local representatives (provided it does not result in unfair practices or major alteration of the EU internal market) however it is clear that that defining this in legal terms is clearly opposed by the Commission.
Citizens expect that public bodies which they fund should be more responsive to the needs of their area and the impact that their spending of public funds has on that local economy. This is not to

say that proper and robust safeguards should not be in place. Practitioners would only be keen if unambiguous criteria were defined in the Directive. For instance defining a maximum geographical distance of the legal seat of the provider from the main population centre of the Council, or an upper percentage of the annual procurement under which a buy local award criterion could be applicable.

Provided that these criteria were uniform, clear and unambiguous and even if they were very restrictive they would still mean a great improvement to the current situation of total exclusion.
It is symptomatic that the first ever EU legal guarantee for shared services (public-public cooperation) came as a provision of the new EU Procurement (article 11). For the first time ever in EU legislation, a definition is given of partnerships between public authorities. Until now the most that the Commission had been able to produce is several guidance notes (Interpretative communications) providing an interpretation on how to understand the (shifting) EU jurisprudence on shared services (Teckal but also Stadtreinigung Hamburg). Even after the latter landmark ruling, the Commission insisted in that its scope and precedent setting were limited in terms of the Commission's line. Thus Article 11 merely codifies the existing case-law, even if in the meantime Protocol 26 of the Treaty has come into force. This means that the Commission has now put into law their prior principle that no private capital should be involved in a shared service and that the degree of control that the individual authorities has over the new shared entity must be equivalent to that of its internal departments.

It could be said that the Commission is merely following the existing jurisprudence, most of those rulings came out before Treaty Protocol 26 came into force. But as the Public Procurement Directive was tabled two years after the new Treaty is in force it could be alternatively said that the commission is making a political and not merely a legal point with this proposal. This will result in the UK Government having to issue new guidance (building on a previous guidance based only on case-law) on what it is in their view a shared service according to EU rules: in other words the UK Government will provide guidance on how the UK institutions are to organise cooperation among them.

This amounts to EU institutions having a say on how the internal organisation of a Member State should be – clearly a power that the EU has not been conferred to exercise.
Moving ahead there is thus a good reason for the UK Government in any future Treaty renegotiation to call for local government services to be , in principle, exempt from EU Internal Market rules. The current protocol 26 of Services of General Interest was a concession to the Dutch Government on the very last day of negotiations, so we believe that politically there is scope to make progress in this and frame role of the Commission regarding local services to a level that is more justifiable that at present.

Interaction with other forms of market integration

5. To what extent do you feel that the Internal Market has been positively or adversely affected by other forms of integration of which the UK is not part, for example the Eurozone or the Schengen Area?

6. Has the Internal Market been helped or hindered by UK involvement in other groupings, such as the G20, the G8, the OECD, or the Commonwealth?

7. To what extent has the Internal Market brought additional costs and/or benefits when trading with countries outside of the EU?

8. To what extent has the UK kept requirements over and above the EU minimum, and what effect has that had on the UK's place in the Internal Market? Have other Member States done so, and if so with what consequences?

It is fair to say that the UK is particularly compliant to Internal Market rules. Just two key examples:

 For the Services Directive the UK had a team of several dozen officials in Whitehall and a robust effort to ensure proper implementation was undertaken across the UK (COSLA provide assistance as

regards to the Scottish Councils). Some of the UK solutions, such as the Web-based Point of Single Contact are regarded as a case of best practice by the Commission worth replicating in other countries.

 For procurement legislation the UK is very thorough implementing and monitoring the compliance of EU rules. A proof of that is that the evidence we had gathered from local practitioner efforts is that the fear of non-compliance has resulted in governmental guidance to Councils based in the most literal interpretation of the EU rules, to the point that even in cases where the Commission allowed national and local authorities a certain room for manoeuvre the UK guidance, followed by the individual Local Authorities, has always encouraged the most thorough interpretation possible of the rules. This fear of non-compliance has led that in the UK most operations that could be put to tender are done so rather than using the exceptions that the EU legislation provides in order to not having to tender out some operations.

One reason for this zeal of compliance is by the fact that the UK scrutiny bodies such as the Accounts Commission and Audit Scotland do exercise a monitoring of local authorities that is more thorough than equivalent bodies in other countries. Equally the fact that UK LAs are the largest average in Europe their activities are larger and easier to monitor by central government or the Commission.
Clearly it could be said that this puts the UK public sector as a disadvantage to other countries whose public bodies have less pressure to follow EU Internal Market rules. However it is not clear, not even from local government, that there should be a trade-off between having more local flexibility if that means in exchange a loss of fairness and public transparency in public decisions.
Future options and challenges
9. What future challenges/opportunities might we face in the Internal Market and what impact might these have on the national interest? What impact would any future enlargement of the EU have on the Internal Market?

Clearly we see the new legal texts recently negotiated (the Fiscal Treaty and the packages of rules to stabilise the euro and increase control over the finance sector) and the new treaties in preparation by the Commission for 2014-5 as an opportunity for the Commission to gain further powers in the area of Internal Market.
However as the Prime Minister speech on 23 January it also provides the UK with an opportunity to press for less EU action in a number of areas such as Internal Market on the basis that the EU institutions adopts an excessive interpretation of the powers that the Treaties confer to them.

Key recommendations to Government:
From the point of view of local government, not just Scottish local government but in fact the vast majority of local government organisations across the EU, there are a number of lines that could be pressed in a future IGC:

Treaty protection of local public services: as mentioned above this can be achieved by surgical changes to Part I of the Lisbon Treaty and an expanded wording of Protocol 26 on Services of General Economic Interest.

- **Legal protection to local services:** if the above is judged tactically too open to challenge on the basis of opening the door for unfair practices and protectionism it could be attempted the obligation for the Commission to table through secondary legislation a framework setting out the areas or principles that would exempt local public services from EU interference. To date the only attempt has been that of a *"Quality Framework for services of general interest":* This non binding proposal was tabled as a trade off to secure the Current commission approval by MEPs. While in the end it only amounted to a general policy guidance which confirms and updates prior Commission guidance of interest for local authorities, rather than a landmark legislation to clarify the extent that local services should be subject to EU rules it shows that the Commission can be open to persuasion if the appropriate levers are put in place.

- **EU Public Procurement legislation should be consolidated** and any current or forthcoming current proposals need to be made consistent with each other, ideally only one department within the European Commission should be responsible for all procurement proposals irrespective of the subject to ensure medium term predictability for local regulatory services.
- Current or future requirements in **EU legislation on free provision of Services across the EU should be done in a proportionate fashion** as to avoid the multiplication of red tape and disproportionate requirements, let alone service quality criteria, being imposed on local councils
- Similarly future requirements in **EU legislation on free provision of Health or other public Services across the EU should be done in a proportionate fashion** as to avoid the multiplication of red tape and disproportionate requirements being imposed on local councils.
- **EU social legislation** needs to take fully into account, and indeed respects, the need for certain local services such as social care or fire and rescue services to be discretionary organised locally including the possibility of setting specific working time limits to ensure continuity of public services.
- Fully develop the EU policy development arrangements contained in the **Part 2 of the Localism Act 2011** so that the Local Authorities or their associations across the UK can work with the UK Government from the moment that the Commission starts formulating policies affecting local government in order to promptly identify impacts, liabilities and opportunities for local government across the UK.

10. Are there any general points you wish to make which are not captured above?

It can most certainly be said that Local Government and their representatives is happy to work with Government in the preparations and the discussions leading to a new Treaty, both in terms of providing additional evidence on the above as well as making the appropriate representations to the above both in Whitehall and in Brussels.

Pact response to BIS Balance of Competence Review: Free Movement of Services (Broadcasting)

January 2014

Executive summary

Telecommunications and broadcasting are exempt from the EU Services Directive but Pact, for the purposes of this review, gives comments on the sector specific legislation which relates to the free movement of services.

As far as the Audio Visual Media Services (AVMS) Directive is concerned, Pact favours the status quo. The current UK legislative framework and AVMS Directive is positive for the fact that it is sufficiently flexible to allow for changes in the market and for individual member states to adapt policy and legislation according to their national requirements.

The retention of rights to introduce tax incentives to support production and culture is important for individual member states. This is due to the nature of the market and fiscal incentives available in competitor countries such as the US and Canada.

Pact would resist any reform to copyright legislation in the EU and in particular any introduction of a single European copyright title. We think that this would unnecessarily restrict the UK and member states and remove flexibility around introducing national initiatives.

On the issue of orphan works, Pact is supportive, provided that adequate protections are in place should the rights holder be identified at a later date. Facilitating the use of orphan works would provide greater opportunities for innovation in the sector, but this must be achieved through a voluntary, industry-led scheme, not through a public body issuing licences.

Pact does not agree that there is a need to introduce extended collective licensing for audio-visual works. Such a move may distort the market value of rights and would not take into account the many reasons why rights may be out of commerce.

In terms of collaboration with countries outside the EU, Pact believes that respect for copyright should be at the heart of every international treaty and that the UK, as a world leader in this field, should look to export its copyright framework to different countries, particularly in developing markets.

Introduction

1) Pact is the trade association representing the commercial interests of the independent television, film and digital media production sector in the UK. The sector produces and distributes approximately half of all new UK television programmes[1] as well as content in digital media and feature film.

2) Pact works on behalf of its members to ensure the best legal, regulatory and economic environment for growth in the sector.

3) The UK independent television sector is one of the biggest in the world with revenues of nearly £2.8 billion in 2012.[2]

4) The British independent TV production sector is extremely successful internationally. The UK is the second largest exporter of TV content in the world (after the USA)[3] and at £838m in 2012, international revenues now account for 30% of total sector revenues in independent TV production.[4]

5) Pact's address is: 3rd Floor, Fitzrovia House, 153-157 Cleveland Street, London, W1T 6QW.

[1] Ofcom, Communications Market Report 2010: independents produced more than 50% of qualifying network programming by hours and 46% by value
[2] Pact Census Independent Production Sector Financial Census and Survey 2013, by Oliver & Ohlbaum Associates Limited, July 2013
[3] Mediametrie Television Year in the World 2013
[4] Pact Census 2013

Telecommunications and broadcasting

1.1 Telecommunications and broadcasting are exempt from the EU Services Directive but Pact would like to take the opportunity, for the purposes of this review, to comment on the sector specific legislation in this space.

1.2 The Audio Media Services Directive establishes minimum standards for broadcast and online services. Its 'country of origin' principle ensures that if a service is licensed in one EU Member State then it is entitled to broadcast in any other Member State. This is positive for independent producers because is allows them to both control and exploit their intellectual property rights across the EU.

Audio Visual Media Services (AVMS) Directive

1.3 The consultation poses questions about the advantages and disadvantages of EU action in the area of broadcasting. The current UK legislative framework and AVMS Directive is positive in the sense that it is sufficiently flexible to allow for changes in the market and allows individual member states to adapt policy and legislation according to their national requirements.

1.4 Pact would like to see these existing characteristics to the framework retained and does not believe that the AVMS Directive should be revisited at the current time.

1.5 In terms of the current status of the TV production sector, despite the fact there has been some consolidation within the independent TV production sector in the UK recent years, the majority of independent producers remain SMEs. Many European programme-makers are SMEs who do not have the same resources to invest in content production and distribution as US companies backed by large studios.

1.6 The current UK Terms of Trade regime is both mutually beneficial to producers and broadcasters and flexible enough in its drafting to enable it to evolve as necessary through a process of market negotiation. These ongoing market-led negotiations illustrate the success of the Terms of Trade as an example of light-touch regulation which can respond to the demands of the market.

1.7 Where possible, Pact favours a market-led approach to the broadcasting arena and a light-touch regulatory approach which has proved successful in developing a strong independent production sector in the UK. We would reiterate that we do not think it is advisable at this time for the European Commission to open-up a debate on the AVMS Directive.

1.8 The current AVMS Directive requirements enable each national Government to establish regulations which promote the creation, distribution and availability of European works within each territory.

1.9 We consider that the AVMS Directive is still an effective mechanism for promoting European works, for example with the 10% minimum European independent production quota and by offering flexibility for each Member State to determine how it defines and independent producer within the options outlined in the AVMS Directive.

1.10 Pact welcomes the flexibility of the AVMS Directive which enables Member States to take into account criteria such as ownership of the production company, the amount of programmes supplied to the same broadcasters and the ownership of secondary rights, when defining an independent production company in legislation.

EU State Aid/ tax incentives

2.1 Due to the nature of the market and tax incentives available in other countries such as the US and Canada, it is important that Member States retain the rights to introduce fiscal incentives to support production of content in their territory which promotes its culture (as with the film, high-end TV and animation tax reliefs in the UK). European member states are not always able to compete with generous tax reliefs available beyond EU borders.

2.2 The UK has a thriving film industry. In 2012, UK film production value was £929m.[5] The UK film tax relief provides important financial assistance to enable film production in the UK by both indigenous producers and by attracting inward investment, from Europe, the USA and around the world.

2.3 Pact strongly welcomes the introduction of new tax credits for high-end TV production and animation in 2013, following UK legislation and approval under EU State Aid rules. These reliefs provide invaluable assistance to sectors which would otherwise struggle to compete with international competition.

2.4 Pact notes that several European countries offer similar tax incentives to attract film, television and new media production in their territory. However, European reliefs cannot compete on rates with international incentives outside of Europe – such as Canada – where there is no maximum threshold on the total amount of production budget on which the relief can be applied. Within Europe, this is capped at 80%.

[5] BFI Statistical Yearbook 2013

2.5 The current UK and EU legislation is sufficiently flexible so as to enable a greater amount of production and therefore increase the likelihood of this having a wider market and commercial appeal.

2.6 Pact was pleased that the Commission decided to further support European production companies by extending the Cinema Communication to include all audiovisual works. This move will enable TV production companies across Europe to more easily access production incentives, including fiscal incentives such as tax reliefs, in different member states.

Copyright in the EU

3.1 The UK's audiovisual sector plays an important cultural role in people's lives and makes a significant economic contribution to the UK economy (£13billion per annum). An effective copyright regime is vital to securing future growth in the sector.

3.2 Content producers are both rights holders and rights users and therefore have an interest in fair access to available rights, provided that rights holders are adequately compensated for their use.

3.3 Pact is engaged in the current debate around potential reform to the EU copyright regime with a view to balancing access to intellectual property vs rights holders and the effective enforcement of rules across Member States.

3.4 Pact is against the proposal that has been mooted for some time now for a Single EU Copyright title. Such a measure would seek to harmonise EU copyright law and replace national laws in this sphere. Pact cannot accept this and believes that the Government should oppose this and leave the current market in place.

3.5 We have already argued the effectiveness of the existing framework and the benefits to the economy, giving a clear regime but flexibility to individual Member States too. It may be that further, higher level harmonisation is possible in some areas as long as flexibility remains for Member States to engage in their own decision making.

Orphan works

3.6 Pact supports the use of orphan works, provided that adequate protections are in place should the rights holder be identified at a later date. This includes the need for the rights user to conduct a diligent search to try to identify the rights owner prior to using the work, and for funds to be placed in escrow for a period of time in order to provide compensation to the rights owner should they emerge once the rights have been used.

3.7 Provided that these measures are taken to protect the rights owner, the remedies for the use of orphan works should be civil, not criminal.

3.8 It is not possible to set standard criteria for the use of orphan works as this would depend on the type of material and its potential use. The assessment of whether or not a diligent search has been conducted should rest with the Courts.

3.9 Facilitating the use of orphan works would provide greater opportunities for innovation in the sector, but this must be achieved through a voluntary, industry-led scheme. It is not appropriate for a public body to issue licences for the use of orphan works.

Extended collective licensing/ Collective Rights Management Directive

4.1 Pact does not agree that there is a need to introduce extended collective licensing for audio-visual works. A collective rights management directive for musical works was introduced in 2012.

4.2 Rights holders must be able to control access to their rights in order to be able to fully exploit opportunities to generate a return on their investments. A system of extended collective licensing would distort the market value of rights and would not take into account the many reasons why rights may be out of commerce.

Copyright and international frameworks

5.1 The UK copyright regime is well respected internationally. For Pact, the strong copyright protections afforded to rights holders in the UK are an important selling-point when attempting to attract inward investment in our content sector.

5.2 Pact believes that respect for copyright should be at the heart of every international Treaty and that the UK, as a world leader in this field, should be looking to export its copyright framework to different countries, particularly in developing markets. This is one area where collaboration with countries outside the EU in ensuring effective enforcement of rights is important.

5.3 In working on this issue in the international arena, it is important that copyright provisions in European and international Treaties are promoted and respected in the UK.

5.4 In general, it is good practice for Government officials and other UK to consult domestic organisations to seek their views before participating in international negotiations on issues which will affect companies and organisations in the UK.

ROYAL COLLEGE OF NURSING RESPONSE

DEPARTMENT FOR BUSINESS INNOVATION AND SKILLS
REVIEW OF EU/UK BALANCE OF COMPETENCES
SINGLE MARKET: FREE MOVEMENT OF SERVICES

ABOUT THE ROYAL COLLEGE OF NURSING

With a membership of over 415,000 registered nurses, midwives, health visitors, nursing students, health care assistants and nurse cadets, the Royal College of Nursing (RCN) is the voice of nursing across the UK and the largest professional union of nursing staff in the world. RCN members work in a variety of hospital and community settings in the NHS and the independent sector. The RCN promotes patient and nursing interests on a wide range of issues by working closely with the Government, the UK parliaments and other national and European political institutions, trade unions, professional bodies and voluntary organisations.

INTRODUCTION

The RCN welcomes the opportunity to feed into a review which we hope will allow for an informed and objective discussion about the impact of EU policy, programmes and legislation on the UK. In an online survey of RCN members, more than 65 per cent of respondents thought that the UK's engagement with Europe was significant for them as a nurse.

The RCN has already responded to the Department of Health's review focusing on the balance of EU/UK competences in health and to the Home Office/Department for Work and Pensions review on free movement of persons especially in relation to the mutual recognition of professional qualifications. However, since this current consultation explicitly asks for evidence and views on the professional qualifications directive, we have outlined below our response to question 10 of this call for evidence:

What do you see as the advantages and disadvantages of EU action on the mutual recognition of professional qualifications (MRPQ)? To what extent do you believe that the cost of existing or future European rules in this area is proportionate to the benefits?

ADVANTAGES AND DISADVANTAGES OF EU ACTION ON MUTUAL RECOGNITION OF QUALIFICATIONS

Facilitating the free movement of workers was one of the cornerstones of the original Treaty of Rome establishing the European Economic Community. For health professionals the key to making free movement a reality has been the original "sectoral" health professions directives, adopted in the 1970s, which allowed for automatic recognition of qualifications where certain minimum education requirements were met. The RCN and

nursing organisations in other countries supported the development of the sectoral directive for nurses in general care. These separate directives have since been integrated into an overarching piece of EU legislation which covers over 800 professions.

The requirements in the directive covering nurses in general care have had a number of important implications for UK nursing. Nursing is a global profession and nurses have been one of the professional groups to benefit most from the free movement arrangements across Europe.

The Nursing and Midwifery Council's statistics, which capture the number of nurses registered to practise in the UK from EU/EEA countries, show the trends in movement of registered nurses to the UK. While the number of EU nurses coming to the UK has been relatively small traditionally, with recruitment much higher from Commonwealth countries, the number from EU/EEA countries has been rising over the last ten years[1]. Some individual trusts in England are now recruiting nurses from Ireland, Romania, Spain and Portugal and the number of nurses registering in the UK from the two latter countries rose to over 500 each between April 2011 and 2012.[2] Recent freedom of information requests have also shown that 22 per cent of NHS trusts in England are recruiting from overseas, largely from the EU[3].

Currently over 15 per cent of new entrants to the NMC register have been trained outside the UK, most of whom are EU trained and over the last 10 years over 60,000 overseas trained nurses have joined the register[4]. EU-trained doctors make up roughly 10 per cent of those registered, and doctors trained outside the EU make up an even greater proportion at about 26 per cent[5]. So it is fair to say that the NHS would not be able to function without the contribution of overseas-trained health professionals.

The RCN sees significant advantages in having a clear system for recognising nurses wishing to work in other EU countries, underpinned by common standards, so that individual nurses can exercise their rights to free movement. However, this should not be used to engage in large scale recruitment as an alternative to investing in nurse education in this country which would exacerbate predictions by the European Commission of a shortfall of nearly 600,000 nurses in the EU by 2020[6].

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[1] UK nursing labour market review 2013, Royal College of Nursing, p18
http://www.rcn.org.uk/__data/assets/pdf_file/0018/541224/004504.pdf

[2] Nursing Standard, vol 27, no 25, 20 February 2013 "*Staff recruitment from abroad rises as trusts plug skills gap"*

[3] Royal College of Nursing, *Frontline First: Running the red light.* November 2013
http://royalnursing.3cdn.net/e678a38646d8d670b1_rdm6bgu19.pdf

[4] UK nursing labour market review 2013, Royal College of Nursing, p19
http://www.rcn.org.uk/__data/assets/pdf_file/0018/541224/004504.pdf

[5] http://www.gmc-uk.org/doctors/register/search_stats.asp

[6] European Commission staff working paper *Action plan for the EU health workforce,* April 2012.
http://ec.europa.eu/dgs/health_consumer/docs/swd_ap_eu_healthcare_workforce_en.pdf

The RCN is concerned by recent studies on future nursing workforce trends, notably by the Centre for Workforce Intelligence[7], estimating that by 2016 there could be a considerable shortfall of nurses. At the same time the RCN's Frontline First report from November 2013 shows that over the last three years the number of pre-registration nurse education places commissioned has dropped by 13 per cent[8]. The RCN therefore welcomed the recent announcement from Health Education England that there would be an increase in education places for 2014 on the previous year and this trend needs to continue[9]. It is clear that a further nursing shortage is looming and there is a clear trend towards NHS trusts in England seeking to recruit from other EU countries as a short-term fix.

The UK also has to factor in the loss of nurses moving to work in other countries. This does not represent an "exchange" with other European countries as most UK nurses seeking work outside the UK are attracted to countries such as Australia, Canada, US and New Zealand.

Significantly, for automatic recognition of qualifications across Europe to work, there has to be an underpinning set of standards for the preparation of nurses and other health professionals to ensure patient safety and care quality and that is why requirements for the content and length of nurse education form an integral part of the EU regulatory framework. The directive has therefore also been an important lever for raising standards of nurse education in countries wishing to join the EU, and in women's access to further education[10], and it has provided some assurances on patient safety.

Given its early adoption, in the 1970s, a further advantage has been to provide a focus for national nursing organisations to begin to contribute collectively to shaping European legislation and has led to collaboration on other EU nursing and health issues, in particular through the European Federation of Nurses Associations (EFN).

IMPLICATIONS OF FUTURE EUROPEAN RULES ON MUTUAL RECOGNITION

Under the current revision of the directive, adopted at EU level in November 2013, the European Commission has sought to streamline processes for migrants seeking professional recognition, a move the RCN supports, where this does not compromise patient safety.

However, in considering recognition of health professionals and their ability to practise in another EU country, precedence has often been given to "removing barriers to free movement" rather than considering the paramount importance of patient safety and public

[7] Centre for Workforce Intelligence, *Future nursing workforce projections - starting the discussion*, June 2013, http://www.cfwi.org.uk/publications/future-nursing-workforce-projections-starting%20the%20discussion

[8] Royal College of Nursing, *Frontline First: Running the red light.* November 2013 http://royalnursing.3cdn.net/e678a38646d8d670b1_rdm6bgu19.pdf

[9] Health Education England, *Workforce Plan for England, Proposed Education and Training Commissions for 2014/15* December 2013 http://hee.nhs.uk/wp-content/blogs.dir/321/files/2013/12/Workforce-plan-investing-in-people.pdf

[10] http://www.euro.who.int/__data/assets/pdf_file/0004/154516/Eurohealth_Vol-17_No-4_web.pdf

protection. So the RCN, other health professional groups, regulators and some governments, sought and achieved the strengthening of public protection measures in the revision of the directive. These included:

- the clear ability of health regulators to make language checks for all EU nurses
- a duty to alert other regulators if a health professional has been banned or suspended from practising in any member state
- exclusion of health professionals from possible "partial access" to that profession in another member state.

Such arrangements, due to be implemented in Member States by the end of 2015, are important for ensuring that nurses registered in the UK have English language skills. The EU rules place a responsibility on "competent authorities" but this should not remove the responsibility of employers to ensure that any health professional recruited for a specific post is competent to carry out that role, including adequate communication skills.

In terms of the European Commission's flagship proposal under the new directive to introduce an electronic certificate, or professional card to speed recognition, the RCN is yet to be convinced as to whether this would improve the current system for nurses and whether any benefits would outweigh the costs and potential patient safety concerns.

Given developments in nursing over the last 35 years the RCN and the European Federation of Nurses Associations (EFN) also pushed for the minimum requirements relating to nursing to be updated and aligned with today's expectations of nurses as autonomous practitioners who assess and respond to patients' needs, develop and manage services, and apply the current evidence base to their practice.[11]

There is still work to do on this in developing a coherent, robust set of education competences through the new EU decision making process of delegated acts, and it will be important that the Commission works with a wide range of expertise to achieve these. The RCN remains concerned that the negotiations on the directive did not introduce a requirement for a minimum of twelve years' general education or equivalent to access nurse education programmes, despite this being the norm in most EU countries. The RCN was also disappointed that the directive did not place a stronger emphasis on the need for health professionals to update their skills regularly and require all member states to have CPD systems in place. This is important given the context of EU nurses seeking recognition in the UK, as UK nurse registrants are required to demonstrate recent practice to remain on the register.[12]

In a wider context, the minimum standards for nurse education to allow free movement are not only important for current EU member states but continue to set a positive benchmark for countries wishing to join the EU and neighbouring states in order to access recognition arrangements for health professionals.

The EU led TAIEX missions and peer reviews have played an important role in preparing

[11] RCN Response to draft EU Professional Qualifications Directive 2011 http://www.rcn.org.uk/__data/assets/pdf_file/0003/434928/RCN_response_to_December_2011_Mutual_Recognition_of_Professional_Qualifications_legislative_proposals.pdf

[12]

accession countries to meet these training requirements and the RCN would want to see this work continued with future candidate countries.

In previous EU enlargement negotiations and reviews of the professional qualifications directive the RCN has also supported the stricter requirements for some Polish and Romanian nursing qualifications acquired before accession, which did not meet the EU standards[13]. We were pleased that the Polish Government responded to this gap by offering bridging courses to those nurses since their accession, and hope very much that the Romanian Government will introduce similar programmes in future, for nurses trained under the old system who do not meet the requirements for nurses in general care. Ultimately in order to be able to benefit from automatic recognition of health professional qualifications and enter the UK register, future member states will need to be able to demonstrate their nurse education meets the agreed EU-wide standards.

In conclusion the RCN and the nursing profession see many advantages in the mutual recognition regime and in particular would not want to see any watering down of EU nursing education standards. There is, however, further work to do within the current EU remit following adoption of the current framework for mutual recognition, including agreement on education competences and a stronger focus on continuing professional development and regular updating of skills for health professionals. And while free movement in Europe brings many benefits for nurses and other health professionals, the RCN would not want to see recruitment of EU and international nurses by employers in the UK used a replacement for robust workforce planning in this country to meet our own nursing workforce needs.

Most importantly patient safety and public protection must be paramount. This means that the balance needs to be addressed between differing areas of EU competence, in particular the EU's remit to ensure "a high level of health protection in all policies", which needs to be more effectively implemented, compared with the drive for free movement and completion of the single market.

Royal College of Nursing UK
January 2014

[13] http://eur-lex.europa.eu/LexUriServ/site/en/oj/2006/l_363/l_36320061220en01410237.pdf

Balance of Competences Review
Scottish Government Response

Single Market: Free Movement of Services

1. To what extent do you think EU action on the free movement of services helps or hinders UK businesses?

A free market which compels Member States to eliminate restrictions on cross-border provision of services while at the same time increasing transparency and information for consumers would give consumers wider choice and better services at lower prices.
The Scottish Government supports the EU's ambition to eliminate obstacles to trade in services. The Services Directive, when fully implemented, will remove red tape and significantly facilitate the establishment of service providers at home or abroad. It should also significantly facilitate the cross-border provision of services into other EU countries. The Directive also strengthens the rights of service recipients, in particular consumers, and should ensure easier access to a wider range of services.
In spite of the criticism it attracted during its introduction, the Scottish Government believes the Services Directive has dealt well with anti-competitive structures within Member States. Growth in services has been an important component of economic growth in the EU over recent decades[1] but there is still considerable potential for further reforms in domestic services markets that would generate additional growth.

2. **To what extent has EU action on the free movement of services brought additional costs and/or benefits when trading with countries inside and outside the EU? To what extent has EU action on the free movement of services brought additional costs and/or benefits as a consumer of services?**

Services are crucial to the European Internal Market. They account for over 70% of economic activity in the European Union, and a similar (and rising) proportion of overall employment.[2] The economic gains from the Services Directive are beginning to be understood now and there are further gains to be realised from the creation of a fully-fledged EU internal market for services. The European Business Test Panel (2009), in which thousands of SMEs participated, demonstrated that different rules in EU member states is strongly resisted by the business community. 50% of the firms would start trading across intra-EU borders if regulations were the same.
On this basis, the Scottish Government is generally in favour of increasing the scope for realising a single market in services but more information is required to assess the costs and benefits.

3. **How well, or otherwise, have the EU's mechanisms for delivering the free movement of services worked?**

The Scottish Government has a commitment to deliver world class digital infrastructure by 2020 that will support anytime, anywhere, any device connectivity.

[1] LSE study, January 2013 http://blogs.lse.ac.uk/europpblog/2013/01/08/eu-services-market/
[2] http://ec.europa.eu/internal_market/top_layer/services/

This is very much in line with the EU 2020 Digital Agenda targets and we welcome the action already taken by the EU to support our ambition.
The delivery of world class digital infrastructure will require hybrids of fixed fibre and mobile networks across the whole of Scotland and we encourage the EU to put in place mechanisms to allow Member States to accelerate fibre roll out as far as possible, such as widespread Fibre-To-The-Home in urban and semi-urban areas; and measures to facilitate infrastructure that will provide mobile coverage to 100% of the population.
The Scottish Government would use any and all regulatory and legislative levers at our disposal to help deliver our world class ambitions[3]. We believe that appropriate regulation, working alongside targeted funding interventions, could potentially play a key role in realising our 2020 vision, particularly in terms of extending digital services to rural areas. For example, we consider that the objectives of the Commission's proposed regulation on measures to reduce the costs of deploying high-speed communications networks align with the Scottish Government's own long-term vision. And we welcome the package of measures recently announced by the Commission in relation to telecommunications market reform, in particular the measure to eradicate mobile roaming charges while travelling in the EU and the proposal to make international fixed-line calls the same price as domestic calls.
The objective of the EU postal policy is to achieve a Single Market for postal services and ensure a high quality universal service. The Scottish Government welcomes this ambition, which fits its own views on how the operation of the Post Office and Royal Mail could best serve Scottish businesses and consumers. These include a minimum level of mail service of six days a week, enhanced connections between the Royal Mail and post offices, and regulation to address issues such as the high cost of parcel delivery in remote and rural areas.

4. What do you see as the advantages and disadvantages of EU action on the mutual recognition of professional qualifications (MRPQ)? To what extent do you believe that the cost of existing or future European rules in this area is proportionate to the benefits?

The mutual recognition of professional qualifications is a key component of the free movement of services. The Scottish Government supports the principle of mutual recognition albeit with some questions on the detail. The Directive provides that "Any EU national who is legally established in a Member State may provide services on a temporary and occasional basis in another Member State under his/her original professional title without having to apply for recognition of his/her qualifications." This helps avoid the situation where inappropriate constraints are put in the way of professionals wishing to offer services in another country.
However, the rules surrounding recognition continue to be fairly complex and could be seen as overly restrictive. The Scottish Government is broadly supportive of the UK Government's position on action in this area. During the negotiations for the Recognition of Professional Qualifications Directive, we pressed for:

- equal treatment of the social work and health workforces, particularly in relation to language testing:

[3] Scotland's Digital Future – First Annual Progress Report and Update" (October 2012)

- a more competency based approach to basic medical training rather than time served recognition of qualifications; and
- the distinction between the skills and qualifications of Tourist Guides (accredited to the Scottish Tourist Guides Association after an academic course) and Tour Managers (not requiring the academic route).

APPENDIX

FREE MOVEMENT OF SERVICES BALANCE OF COMPETENCE CALL FOR EVIDENCE – DEFENCE PROCUREMENT QUESTIONS

Overriding Question: Your views on the effect of EU action so far in the defence sector and on the desirability of further action

1. What do you see as the advantages and disadvantages of EU action in defence procurement and the defence industry more widely?

    a. How appropriate is the current balance of competence between EU and Member States?
    b. How successful are Member States in implementing the existing Defence Package?
    c. In your experience do Member States take a consistent approach to enforcing EU rules, or not?
    d. How do you consider Member States current use of Article 346 impacts upon defence industry across the EU?

2. To what extent do you believe that the costs of European rules[1] in the defence industrial sector are proportionate to the benefits?

    a. To what extent do you think EU action in the defence industrial sector helps or hinders UK businesses?
    b. To what extent has EU action in the defence industrial sector brought additional costs and/or benefits when trading with countries inside and outside the EU?

3. What is your view of the effect of EU rules on the defence industrial sector?

    a. How well are the EU's mechanisms for delivering its policy objectives in defence, including promoting a single market in defence goods and services, currently working?
    b. What obstacles still remain to the creation of a single market in defence goods and services?
    c. Is there a case for more proactive enforcement of the existing EU Defence Package by the Commission to ensure a level playing field?

4. Going forward, what are the advantages and disadvantages of an increased role for the EU in the defence industrial sector?

    a. What areas, if any, would merit increased attention from the EU?
    b. What future challenges/opportunities might we face in the defence industrial sector and what impact might these have on the national interest?
    c. What role do you see for the EDA in the defence industrial sector?

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[1] Essentially the Defence Procurement Directive and Intra Community Transfers Directive.

Answers to questions on FREE MOVEMENT OF SERVICES BALANCE OF COMPETENCE CALL FOR EVIDENCE-DEFENCE PROCUREMENT QUESTIONS

By DR CHARLES TANNOCK MEP 10/01/2014

1

a) First let me preface my comments by stating that these contributory answers are my personal views based on being an MEP on the European Parliament Foreign Affairs Committee and Defence sub Committee and do not necessarily reflect the views or policies of the UK Conservative MEP delegation, the ECR group in the European Parliament or the UK Conservative Party.
Ultimately defence off the realm is rightly the cornerstone by which the UK ensures national independence and sovereignty, which is essential for any state, and even more so for a country like the UK which remains a member of the UN Security Council and a nuclear power with the 6th largest global economy and 3rd in Europe. Therefore currently there is an acceptable compromise regarding the operation of a single market in the defence sector which recognises this fact and was reflected by the EU in the Lisbon Treaty Art 346 which aims to safeguard national security interests by exempting defence procurement from EU competition and state aid rules and allows for secrecy and national preference in the armaments markets.
Nevertheless a strong pragmatic case can be made, without the favouring of an emerging European superstate, or undermining the role or primacy of NATO, for the UK to support further liberalisation of the defence sector market which is currently fragmented and often protectionist in nature across the EU 28 member states. This necessity is even more evident at a time of budgetary defence cuts everywhere in the EU which show no sign of change due to competing budgetary needs making affordability therefore now a major political concern. All of this justifies more effective EU intergovernmental coordination in seeking value for money for UK taxpayers in terms of defence procurement, interoperability and avoidance of duplication of manufacturing capability and R &D across the 28 member states for enhancing their collective military capabilities, particularly in key gap areas like air to air refuelling and cyber defence as identified under the Capabilities Development Plan of the EDA, as well as promoting more harmonisation of procurement standards between our EU partners. A gradual relaxation and simplification of national export control systems and licencing procedures applied to EU defence contractors is therefore a reasonable objective even for those more hostile to more EU political union but can still see economic advantages to the EU Single Market within what is now formally termed for the sector the “European Defence Equipment Market” (EDEM). In a similar vein the EU CSDP policy of “pooling and sharing” is also a stated and reasonable principle which aims at giving a degree of autonomy of action for European states and is not entirely dissimilar from NATO’s “smart defence” concept.
Therefore a pan-European healthy defence technological and industrial base (DTIB) remains in the UK interests as often critical economic and skills mass are essential requirements best realised by joint ventures with our European partners, as evidenced by the successful

Eurofighter typhoon project. Large scale defence sector projects are rarely standalone and have additional synergistic effects in the civilian sectors of the economy by developing new dual use technologies, which at a time of large scale unemployment in many EU states can help promote economic growth and jobs both in the UK and our EU trading partners and thus help stem large scale migratory pressures from poorer to richer nations, which is seen as currently particularly problematic for the UK.

The EU CSDP is here to stay for the foreseeable future whether the UK likes it or not and in my experience the UK can often project its own security interests in much of the current CSDP activities ranging from the anti-piracy operations of Eunavfor Atalanta in the Indian Ocean to the EUTMs in Mali and Somalia. Irrespective of the UKs long-term continued membership of the EU it is likely the UK will, whether In or Out of the EU post a 2017 referendum, remain for the most part closely aligned with our EU partners in defence and foreign policy matters as the UK is only one of two major military powers in the EU. The UK has a sizeable defence sector alongside France and for most of EU member states the CSDP, including France in particular, is regarded as part of their national defence strategies, so CSDP military effectiveness remains also of national importance to us too be able to act internationally militarily with our EU partners. The UK is also likely to be home to a disproportionate number of centres of R&D and defence sector production excellence due to the relatively large defence sector in this country so a more open "European Defence Equipment Market" (EDEM) could significantly disproportionately benefit UK defence exporting companies in supplying the needs of many other EU countries, particularly if the EDA is successful in coordinating investment and pooling of their demand. This will also help the preservation of high quality defence sector jobs in the UK and stem the risks of these skilled individuals going abroad particularly to seek employment in the USA where it operates a more protectionist regime via the "Buy America" policies than most EU states do. This may explain why most defence companies I have encountered favour active engagement in this policy area and continued EDA membership for the UK

Therefore in my opinion at least on paper the current balance of competences between the UK and EU for Defence Procurement and the development of a more integrated EDEM would appear to be appropriate and if fully realisable in the UK national interest.

b) The EDEM is expected to progressively and inevitably over time become in due course more of a reality and will be driven by reasons of economy of scale and budgetary restriction as described above. When fully functioning defence sector manufacturers established in one state will be able to supply their products across the single market with minimal paperwork, less cost and under home state supervision. The EDEM should therefore be a more rationalised one in terms of its operation by reducing licencing costs (of particular benefit to SMEs) and improved in terms of transparency and eventual avoidance of unnecessary duplication and rendering obsolete the use of the traditionally used sweeteners but market distorting civilian offsets ("compensation orders"). In addition EDEM aims for more specialisation and integration of the supply chain across EU member states in the DTIB. This is a stated objective shared by all member states active in the CSDP and formally was codified following the promulgation of the "Defence Package" in particular the Directive 2009/43/EC on transfers of defence-related products, the Directive 2009/81/EC on defence and security procurement whose aim is to standardize procurement procedures currently used by Member States and the earlier EDA promoted Code of Conduct on Defence Procurement (in force from 1 July 2006) and the Code of Best Practice in the Supply Chain aimed particularly at helping SMEs (in force from 29 March 2007). This bold pioneering

legislative package followed the earlier keynote 2007 European Commission Communication "A Strategy for a stronger and more Competitive European Defence Industry". These Directives apply the fundamental principles of the internal market to the defence sector, but at the same time they leave to Member States considerable room for manoeuvre and flexibility to ensure that their security interests are protected. Perhaps unsurprisingly there have been significant delays in the transposition process of both Directives.
The overall aim is in my view a laudable one of establishing a single EU defence sector market and particularly for SMEs to have improved access to this but also to make the traditional widespread current use of Article 346 (ex Article 296) derogations only to be used in future for exceptional areas affecting member state national security where secrecy and national preference is still fully justified. This would be in line with the ECJ opinion but which so far has been regrettably largely ignored. So in summary in answer to the question at best the implementation of the EU Defence Package remains “work in progress” as it means overturning decades of mutual mistrust and overturning long established trading partnerships, such as the well-established transatlantic one, as well as threatening some potential job losses for some member states in some sectors as the advantages of economy of scale of a single defence products market would finally materialise.

c) I do not have the impression that EU member states take a consistent approach to enforcing the EU rules but am not aware of any academic study investigating this important question objectively and the EDA/Commission should be made to research and answer this.
Since the Directives only lay down a legal framework that needs to be translated into national rules and applied by national authorities, there will unavoidably be differences among Member States. Precisely to leave flexibility to Member States, the Directives only provide for partial (not full and complete) harmonisation. The existence of differences among Member States rules and practices is not in itself a major problem for the internal market. The key issue is to avoid protectionist measures, discrimination against foreign suppliers and major unjustified obstacles to trade.

d) I have given my views on Article 346 in my answers to a) and b) but since recourse to Article 346 TFEU does not require any formal notification, it is hard to have a complete and detailed picture of how Member States currently use this provision. However, an excessive and unjustified recourse to Article 346 TFEU is still likely to represent one of the main limits to a well-functioning internal market for defence.

2

a) I am not aware of additional major costs associated for UK Defence contractors with the Defence Package rules which were rightly aimed at liberalising the EDEM and facilitating cross border transfers by reducing paper work, costs and red tape and reducing national licencing requirements so it should at least in theory help cost savings for the UK defence sector particularly SMEs.
The UK public procurement authorities have a tradition of market openness rather than preference towards national suppliers. Moreover, UK defence industry is highly competitive worldwide. Due to the combination of these two factors, UK defence businesses are likely to significantly gain from the opening of national defence markets and to be on the winners’

side in an internal market for defence. The additional costs for businesses stemming from the EU defence directives seem to be rather limited. At the most, the obligation to organise transparent and competitive tendering procedures would imply organisational costs for the public authorities, not for businesses. The gains are likely to outweigh the costs.

b) Similarly I am not aware of additional costs in exporting to 3rd countries and given the success of French, Swedish and German exporters doubt this is so. The European Defence Equipment Market in the Global Context project promoted by the EDA is specifically aimed at overcoming these 3rd country export barriers for EU defence sector companies.

3

a) My impression is that harmonisation, transparency and equal treatment of defence procurement which should ultimately have economy of scale advantages is still very much "work in progress".
Entering into force in 2009, the Defence Procurement Directive had to be transposed by August 2011. However, transposition in all 27 Member States was accomplished in March 2013 only. It is therefore still quite early to draw conclusions on the impact of the Directive on the openness of defence markets. Considering in particular that defence remains a specific market with a longstanding tradition of national fragmentation, achieving the objective of having a genuine and well-functioning internal market for defence will inevitably take some time. The EU legal framework seems to be the appropriate means – and probably the only one –to achieve this objective.

b) This needs more support from member states to become effective. So far the 6 largest defence sector states namely the UK, France, Germany, Italy, Sweden and Spain have chosen a more controlled and gradual process. There are no real sanctions for breaking the various defence package directives and to my knowledge not all states have fully transposed them yet into domestic legislation and fully done away with their national licencing procedures for exports to EU states.

c) Probably to achieve a true single market and a fully-fledged EDEM it will require a muscular and proactive approach by the EU Commission but this area is understandably a very delicate and sensitive one and the EU is still trying to battle with existential issues like stabilising the Eurozone, making the EEAS and CFSP more cohesive, coping with the rise of widespread Eurosceptic parties hostile to new integrative economic projects expected to be elected in May 2014 to the next European Parliament and the possibility in 2019 of UK EU secession ("Brexit"). So the dust will need to settle and a new confident European Commission appointed before this issue will be formally examined and only if the EU member states give a strong and united political steer through a European Council summit instruction. The truth is that in the vast majority of cases the risks of exporting defence equipment to EU member states involves little or no risk to UK national security and most impediments to export are not really security based but economic protectionist based.

So in answer future enforcement actions from the Commission on the application of the defence procurement directive will indeed be important to help ensuring a level playing field. Businesses can also make a significant contribution to enforcing the rules and ensuring a level playing field both by providing information to the Commission and by challenging

unfair or discriminatory decisions of national authorities before national courts. In the recent Communication "Towards a more competitive and efficient defence and security sector" (COM(2013)542 final), the Commission explained that, given the specificities of the defence market, specific measures are needed to ensure that the Directive is correctly applied and fulfils its objective. In this context, the Commission announced that it will monitor the openness of Member States defence markets and regularly assess via the EU's Tenders Electronic Daily (TED) and other specialised sources how the new procurement rules are applied.

4.

a) Better coordination with NATO who are equally concerned with all these challenging budgetary constraint issues and are promoting "smart defence". Also focus by the EU on the TTIP negotiations with the USA, and examining what TTIP and the EU FTAs with allied NATO countries like Canada could potentially mean in terms of mutual advantage by promoting the transatlantic trading liberalisation of the defence industrial sectors of both parties.

As mentioned in the Commission Communication and the European Council Conclusions of December 2013 (para 17), the key priority remains ensuring the full and correct implementation and application of the two defence Directives. Another key priority is finding ways (non-discriminatory alternatives to offsets) to foster cross-border market access in defence for SMEs. This should build on the possibilities that EU law already offers on subcontracting and general licensing of transfers. Finally, another very important topic in the coming months will be Security of Supply. Both the Commission Communication and the European Council Conclusions stressed the importance of Security of Supply for the functioning of the internal market for defence. In this context, the European Council called on the Commission to develop with Member States and in cooperation with the High Representative and the EDA a roadmap for a comprehensive EU-wide Security of Supply regime, which takes account of the globalised nature of critical supply chains.

b) The increasing need for encouraging economy of scale in the defence sector in a climate of cuts and less political will by the UK's closest ally the USA, (with its declared pivot policy to the Far East and announced cuts in US DOD spending), to pick up the costs of European defence requirements. There is a recognised strong need to do more to encourage cross border EU as well as international joint ventures in defence related sectors but also open up the defence sector domestic markets more by reducing barriers to entry for SMEs. The need to consider ways to counter other security threats e.g. cybersecurity, climate change, food security, asymmetric terrorist threats looking beyond the manufacture of traditional armaments and to ensure adequate training in our schools and universities to equip students of shortage subjects like engineering with the skills match requirements for the sector. All the priorities already outlined above in my answers to 4 a) are related to ensuring the good functioning of the internal market for defence and therefore seem to be broadly in

line with the national interest of the UK. The work on Security of Supply will anyway closely involve EU member states as they are the most important players in this respect, so national interests will be safeguarded.

c) I know that HMG is currently reviewing UK membership of the EDA (and thus joining Denmark with an opt out) but the budgetary contribution of c. £3million is very small for the potential returns, if even modest value is added by its four strategies to enhance efficiency of EU CSDP operations. There is a need to ascertain whether this can be clearly demonstrated from some of the current projects it sponsors aimed at enhancing military effectiveness and thus can potentially also project UK national interests in examples of where CSDP is currently proving successful e.g. the anti-piracy operation Eunavfor Atalanta. Potentially the EDA could also help identify new funding opportunities and thus improve access by the UK defence sector to EU funds such as Horizon 2020. Over the last decade since the EDA was founded in 2004, a number of new cross border R&D projects have been initiated at its invitation. These range from developing specialised electronic devices in the telecom sector, through UAVs, to a complex satellite mapping of the Earth's surface, but air to air refuelling and air transport training seem some of the most likely winners it has picked so far and identified as a key capability gap. The Capability Development Plan (CDP), one of the 4 strategies in place underpinning the EDA, provides mechanism to audit the needs and value added from these projects.
The streamlining of the EDA into only 3 directorates from its previous 5 entering into force in January 2014 with cost savings is an encouraging sign of the EDAs awareness to improve efficiency and value for money to all EU taxpayers.
The EDA can have also have a useful supporting role in certain areas of industrial policy (such as standardisation and certification). On the other hand, as an intergovernmental agency, it is not its role to be involved in policy-making in the area of the internal market for defence, where EU legislation already exists and this must remain firmly in the hands of national governments.

FREE MOVEMENT OF SERVICES BALANCE OF COMPETENCE CALL FOR EVIDENCE – DEFENCE PROCUREMENT QUESTIONS

Overriding Question: Your views on the effect of EU action so far in the defence sector and on the desirability of further action

Summary of Thales UK's position

It is Thales UK's position that the current balance of EU Competencies within the area of Defence Acquisition is broadly correct. The UK Government should resist any proposals for significant expansion of EU powers in this area.

Responsibility for the use, deployment and management of national defence forces must continue to ultimately reside with individual member-states, and not the European Commission. The UK Government should resist any proposals that extend Commission competence in defence matters and undermine the national competence of individual member-states.

Implementation of the Defence Procurement, Defence and Security, and the Intra Community Transfers Directives should be completed, with full assessment of their impact, before any further significant changes are proposed.

UK support to industry within the EU and NATO is well below the average of other countries, placing UK industry at a significant disadvantage when engaging in opportunities relating to them. The UK should increase its industrial support presence in these bodies to provide industry with better access and representation. This is particularly key within the R&D and technical committees, where the UK is not shaping future requirements and R&D funding streams.

What do you see as the advantages and disadvantages of EU action in defence procurement and the defence industry more widely?

Continuing financial constraints - both within the EU and among NATO allies - means there is an economic imperative to spend more smartly on defence and security, whilst increasing access to novel and advanced technologies by a wide range of state and non-state actors could have an escalatory effect on R&D costs. On the whole these tensions will require greater collaboration between States in order to meet future defence requirements.

Arguably, the use of military power is wholly discretionary. The competence to deploy and use Armed Forces in support of defence or national security aims must remain a national competence. It must be recognised that within the EU, some nations – e.g. UK and France – are more willing than others to act militarily. They have consequently larger defence budgets and a greater need to protect key national military capabilities. They may wish to retain freedom of action and therefore legitimately define "sovereign capabilities".

These must withstand reasonable scrutiny but there is a limit to defence homogenisation within the Community. The UK should resist any attempts by the EU to erode national competencies in this area.

More widely, the UK defence industry has significant trade interests outside of the EU. EU policies must not negatively impact on these industrial relationships. UK industry must be in a position to prosecute global defence opportunities; success in export markets will rely on industry's ability to collaborate with the appropriate industrial partners. Often these global export opportunities can only be developed and prosecuted on a bilateral Governmental basis. EU regulations and Directives must not interfere or overly complicate these activities and any encroachment by the EU into these areas (e.g. by expanding competencies into Defence Sales or Export Control) could have serious financial and political impacts.

How appropriate is the current balance of competence between EU and Member States?

The current balance is about right, with a number of Directives already in place that should ensure a level playing field for industry across the Community. The EU needs to concentrate on the implementation and enactment of these existing regulations; there is arguably still some significant way to go in this regard. There appears to be no requirement for further Defence Directives at this time.

In particular, the UK should resist any move by the EU to develop competency in the area of managing extra-EU offsets.

How successful are Member States in implementing the existing Defence Package?

Progress appears to be slow and limited. In outsourcing services, for example, the whole of the rest of Europe achieves just 50% of the UK by output value, and this sector is predicted to level off from 2020 whilst it continues to grow in UK. Some service markets are not yet even available. This is an important growth area for UK industry and key to the delivery of lean supply chains and coherent, complementary military capabilities. The use of Contractors on deployments, for example, is often limited or forbidden by some nations on the basis of "EU Employment Law". Clarification in this area by the EU in support of the UK model would be an important step forward.

In your experience do Member States take a consistent approach to enforcing EU rules?

The EU still has an important role ensuring that the current Directives are fully embedded across Member States and enacted accordingly.

How do you consider Member States current use of Article 346 impacts upon defence industry across the EU?

Thales UK supports the Commission's efforts to foster an open and competitive defence market that encourages innovation, while minimising bureaucracy and the regulatory burden on businesses. However, individual Member States' policies on the deployment of Armed Forces differ significantly across the Community. Therefore, defence industrial activity levels are not homogenous across the Community and are often shaped by national security considerations. Interpretation of "national interest" should reasonably remain the competence of Member States to sustain freedom of action.

There is evidence however that national interests may be invoked to limit or prevent open competition, frequently motivated solely by local economic concerns. The application of Article 346 should only be invoked on a case by case basis and following a clear statement of a Member State's requirements for a sovereign industrial capability.

Nevertheless, the UK is a major European military power and has demonstrated a willingness to deploy its forces operationally. There is an according level of sensitivity around a number of deployable capabilities.

Thales UK has significant competence in a number of sensitive areas, where the UK's national security needs remain paramount and capabilities are classified. Specific capability areas might include C-IED, Cyber, Surveillance, Protection, Security and ECM. Most of these activities require UK Government clearance and it would be extremely concerning if the EU were to attempt to force 'openness' into these areas.

When used correctly, Article 346 is not necessarily anti-competitive – the UK Government has competed many of its nationally sensitive capability requirements. Thales UK has won most of its current contracts in open competition.

To what extent do you believe that the costs of European rules[1] in the defence industrial sector are proportionate to the benefits?

It is difficult to quantify the "costs" at either company or State level. Any action by the Commission to reduce red tape and the cost of doing business within the EU would be welcomed.

However, cuts to the UK's presence in the EU and NATO do not appear to represent good value for UK industry. At present, UK support to industry is well below the average of other countries within the EU and NATO and this places UK industry at a significant disadvantage in prosecuting related opportunities. The UK should increase its industry support presence in these

[1] Essentially the Defence Procurement Directive and Intra Community Transfers Directive.

bodies in order to provide industry with better access and representation. This is particularly key within the R&D and technical committees, where the UK is not maximising her ability to shape future requirements and R&D funding streams.

To what extent do you think EU action in the defence industrial sector helps or hinders UK businesses?

It can be very beneficial in the right circumstances, providing access to new markets and acting as a catalyst for collaborative programmes that otherwise might not be affordable at individual Member State levels.

EU efforts to prioritise the simplification of procurement rules would be a significant help for improving access to defence contract and sub-contract opportunities within the wider community.

However, the EU needs to consider the influence and activities of NATO within this sphere and not seek to replicate structures nor compete where NATO has a greater competence. The UK is a key member of the NATO alliance and it could be detrimental to UK business if EU activities were to disrupt or countermand NATO.

The UK has a number of important bilateral and multilateral relationships with EU and non-EU states and these must take precedence where appropriate.

To what extent has EU action in the defence industrial sector brought additional costs and/or benefits when trading with countries inside and outside the EU?

Within the current EU construct, Thales UK works in a seamlessly integrated manner with other internal company units spread across the EU, and competes in an internal market to make extensive use of EU Framework and Horizon 2020 R&T programmes. Any reduction in the UK's influence in the EU could terminate the benefits received from this well-geared (circa 50% grant funded) R&T support mechanism and represent a net loss, hindering innovation and reducing the availability of new products, thus impacting future revenues. This would also disadvantage UK R&D centres when compared to rival centres in the EU. The UK's EU membership does increase the attractiveness of the UK as a place to conduct research, even with non-EU partners.

Currently there appears to be little impediment to prevent non EU members bidding into an EU member state competition. It remains to be seen how this might change if the EU took a more protectionist stance in the future.

What is your view of the effect of EU rules on the defence industrial sector?

On the whole, the rules should provide a safeguard to ensure free and fair competition. However it can be noticeably easier to conduct business outside of the EU. The Commission should seek to continue to reduce red tape and administrative burdens on customers and suppliers where such activity does not support broader competitive advantage.

How well are the EU's mechanisms for delivering its policy objectives in defence, including promoting a single market in defence goods and services, currently working?

The Commission has a key role to support the development of the defence internal market through monitoring the implementation of the existing Defence Procurement Directive.

What obstacles still remain to the creation of a single market in defence goods and services?

The lack of a consistent approach to the treatment of national security issues will continue to be an obstacle. Cultural concerns regarding the outsourcing of some defence activities will prevent the development of a thriving, pan-European defence services culture.

Security of supply of goods and services is an important factor in collaborative programmes, and provisions within the Directive on Intra-Community Transfers need to be enacted.

Is there a case for more proactive enforcement of the existing EU Defence Package by the Commission to ensure a level playing field?

The creation of a level playing field will be shaped as much by defence industry consolidation as it is by open competition. The EU should ensure that national security considerations do not unduly affect future competitions or consolidation.

Going forward, what are the advantages and disadvantages of an increased role for the EU in the defence industrial sector?

The UK Government should resist any initiatives that would extend European Commission competence over defence procurement to the detriment of national member-state competence. Any initiatives should complement national defence and security strategies.

The EU should not expand its competence into areas that would bring increased cost without increased benefits. For example, the EU's proposal to

become involved in defence marketing abroad might be particularly inappropriate, bringing extra costs with few obvious benefits.

What areas, if any, would merit increased attention from the EU?

The EU might wish to consider the development of policies on:

- Facilitation of the movement of people (especially with security restrictions that apply in the defence industry)
- Recognition of equivalence between national qualifications.
- The transfer or sharing of technology to avoid duplication of R&T and R&D, whilst protecting IPR
- Cross border defence companies
- The interpretation of company law and its impact on the provision of defence services, particularly in conflict areas.

There should be further development of the existing Services Directive to develop the definition of service provision within defence and support the widening of this market.

Increased EU Competence may be of benefit in developing common standards, for example in Cyber Security. Due to the lack of true boundaries in this technology and the speed of its development and evolution, a common standard might be of use. ISO Std 27001 is a good example of a standard for security- however, this is just the beginning and further development work of standards in this arena would be of significant benefit.

What future challenges/opportunities might we face in the defence industrial sector and what impact might these have on the national interest?

Lack of planning and foresight (e.g. wasted R&D spending), plus constitutional, financial, behavioural and cultural issues all limit opportunity. Better forward planning, with the correct legal structures to enable pan-nation sharing of technology developments, whilst protecting IPR, are key.
In the medium to long term, the lack of movement across the EU on the provision of defence services will constrain an important growth area of UK industry. This might also impact on the UK's military effectiveness in coalition operations, where differing views on the use of contractors may negatively impact freedom of action.

What role do you see for the EDA in the defence industrial sector?

The EDA could lead on developing a commitment from individual Member States for increased consolidation of demand across Europe, which may include the development of programmes based on common capability requirements.

Most importantly, the EDA should promote the provision of services to provide efficiencies, stimulate consolidation, and promote economic growth. UK industry is ideally placed to benefit from such a move.

The EDA should also lead on greater use of common purchasing where applicable within EU; the development of financial mechanisms and incentives to support collaboration and encourage investment in defence; provide EU structural funding to address issues of rationalisation; and enable EU R&D funding to support the development of dual-use technology products in appropriate circumstances.

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To whom it may concern

Hutchinson 3G UK Limited (Three) response to the UK Government's Call for Evidence in Relation to the Balance of Competencies between the UK and the European Commission

This is the response of Three to the Government's Call for Evidence in relation to the European Single Market and the Review of Free Movement and Services, published first in October as part of the Government's Review of the Balance of Competencies between the United Kingdom and the European Union.

Three welcomes this opportunity to participate in this important debate and bring our experience to bear, both as the UK's leading provider of mobile data as well as the most successful challenger communication's company in Europe. Three is part of the Hutchison Whampoa Group of companies, the largest inward investor in the UK. Our response is limited to those questions in the Call for Evidence that are relevant to Three and some more substantial comments about the implementation of European Directives in the UK and across Europe more widely. We hope that this is helpful.

Three believes that the Government's review of the balance of competences is an important piece of work, that if conducted properly, can garner informed views on how, and potentially drive improvements in both the ways in which the European Commission promulgates legislation and Member States implement that legislation.

However, we believe it is potentially misplaced to focus on where competencies should sit as this potentially boils down only to high level arguments on points of principle. The debate instead should focus on the quality and purpose of decision making and whether the impacts of that decision making is beneficial to UK business. We believe that exploring this aspect of the debate in more detail might yield greater benefit.

It seems to us that the balances of competencies is broadly in the right place and provide an appropriate level of checks and balances. We do not believe there are many areas of the market that might benefit from either greater subsidiarity or for the ceding of wider ranging powers to the decision making bodies of the European Union. However, it is our view that there are real advantages to the scale and scope of the single market as well as to consistency in the implementation of legislation. Consistent implementation of pro-competitive legislation is likely the most effective way of delivering improved industry, services and economic growth.

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The regulation of the UK and European communications sector

As a communications provider Three is not covered by the terms of the Services Directive but instead by the sector specific directives which together make up the European Electronic Communications Framework. This is intended to deliver for the communications sector the same outcomes around a free, open and competitive market as the Services Directive. In the UK, the Electronic Communications Framework is implemented through the Communications Act 2003 and other amending legislation.

It is without doubt that the UK communications market has benefitted from some of the most forward thinking and pro-competitive legislation and regulation in the world. This is the consequence of both European and domestic legislation that has driven ever greater competition and opened up the communications market to new players. This has benefited consumers and the UK economy, both in terms of the lowest priced and best value mobile telephony in the Europe but also in terms of the continued rollout of new and improved infrastructure. In many respects, the liberal UK approach to the regulation of markets has provided the model for legislation at a European level. This is to be welcomed.[1]

However, this does not mean that a change in the current balance of competencies towards the individual Member States would be to the benefit of UK businesses. Rather the approach taken to the implementation of some European Directives by the UK, namely to advance competition and to further the development of fair, competitive and open markets, should be adopted more consistently by the European Commission when promulgating legislation and should provide a model for other Member States when seeking to implement legislation.

If European operators and businesses are to benefit fully from the access to potential markets that Europe can provide, and in so doing, become truly global players, then more needs to be done to further the integration of those markets, improve competition through the removal of anti-competitive bottle necks and incumbent advantages, and ensure a fair and level playing field.

Whilst Three is aware that a politically consistent approach may not always be optimal or indeed practicable for all Member States, Three believes that there is much to be gained both at a European and a national level through the consistent promotion of competition to the benefit of both consumers and business. We recognise that there may well be market failings and inconsistencies in some states that may require distinct remedies but suggest that the promotion of free and fair competition and the removal of anti-competitive bottle necks should be the primary focus of European policy making and the implementation of European Policy at a member State level. We believe that this approach will provide the best outcomes for both Europe's citizens but

[1] Three notes that recent regulatory interventions by the communications regulator, Ofcom, have diverged from this pro-competitive approach. Increasingly, Ofcom has sought to regulate consumer outcomes, particularly in relation to: mid-contract price changes; measures to tackle bill shock; accessible services for disabled consumers; and information to consumers on network performance.

While Three recognises that it is entirely valid for the regulator to consider these issues, these should not come at the expense of decisions necessary to improve competition. It is also questionable whether such interventions are the best means of achieving those outcomes or whether the right correct of intervention was chosen, as they reduce the ability and scope of operators and other providers to differentiate the services they offer and compete with one another.

In many cases these interventions are not light touch and the cost is ultimately borne by the consumer. Three has no doubt that the market could deliver solutions to consumer issues at less cost. Three is clear that were Ofcom to spend greater resource on ensuring a fair, competitive and open market, then many of the consumer issues that it is currently seeking to resolve through regulatory intervention would be addressed through positive differentiation in the market.

also its businesses and think that the UK Government is uniquely placed to drive these objectives forward.

Specific areas for further action at a European and national level

It is Three's view that improving competition across markets should be the prime driver of European economic policy and the focal point of the UK Government's implementation of European Directives. However, addressing restraints on competition no longer appear to have been a priority for legislators in Europe and in the UK. Current proposals in the Draft Regulation for a Consolidated Single Market in Electronic Communications are symptomatic of this trend. These seek to legislate for specific market outcomes, particularly in relation to international roaming charges, that and are potentially discriminatory and will ultimately undermine competition.[2] We believe that were legislators at both European and national level to spend greater resource on ensuring a fair, competitive and open market, then many of the consumer issues that legislators are currently seeking to resolve through regulatory intervention would be addressed through positive differentiation in the market.

Three believes that there are a number of important interventions that remain to be made in the communications market at a European level, if it is to deliver for consumers and business in the UK and across Europe. These are in relation to the deployment of networks, the management of spectrum and the wholesale market that the need to realised across Europe. Both the Commission and Member States should look to expedite these to create a fairer, competitive and more open market. This will help to create the conditions that European and UK businesses need to flourish. Similarly, action in these areas will enable communication providers to compete more vigorously and effectively with each other, and deliver benefits to consumers

Specifically, The European Commission and Member State Governments should act to encourage more efficient and low cost network deployment through the timely release of future tranches of spectrum at sustainable prices and in a manner that avoids allocations that will undermine long-term competition.

Additionally, the Commission and national Governments must also take meaningful action to further reduce the wholesale costs of roaming, if the benefits of a truly single market in communications are to be realised. This was the intention behind the Second and Third Roaming Regulations and their record has been one of success with real reductions in retail costs delivered across the sector. Current proposals seek to provide for predetermined outcomes that are anti-competitive.

Both the Commission and the UK Government have also identified consumer switching as the one of the key means through which increases in consumer costs can be restrained. However, switching processes differ across Europe and in many markets are chaotic, difficult for consumers to manage and ineffectual. In mobile, most of the Europe has adopted a Gainer Led model to the benefit of consumers and competition. This has not been the case in the UK which remains an outlier in Europe and continues to operate a donor led system which results in delay and poor outcomes for the consumer.

The Commission and national Governments will only succeed in promoting effective competition if consumers can switch from one communication provider to another without the undue hassle

[2] We support the policy outcome, but believe it is best arrived at through market competition – see Three's recent launch of free roaming across a range of EU and non-EU countries. Mandating a competitive outcome removes competition and undermines incentives to invest and innovate in services: Three's bold market leading proposition will lose its edge. To the extent roaming regulation is required to achieve the policy outcome, it should focus on wholesale inputs to support retail innovation.

and delay. Until this happens, consumers will still face unnecessary barriers when trying to move between providers and real competition in the market will continue to be impeded.

A level playing field in future

Legislators in Europe and at national government level have also not done enough to ensure that the competitive playing field across markets and particularly in the communications market is truly fair. Again, this is to do with the nature and quality of legislation and implementation, rather than the competency or degree of subsidiarity. We believe that there is a real role for the UK Government in ensuring that European legislation promotes fair competition.

Specifically, legislators need to look at the burden across service providers to ensure that UK and European businesses are well placed to compete globally.

Regulation across Europe has historically assumed the vertical integration of communication provision. However, increasingly this regulatory assumption has been overtaken by growing differentiation between network and service level competition. The consequence of this is many service providers, particularly Over The Top providers, are not bound by UK or European regulation, despite providing services that, in many cases, are identical to the consumers as those provided by traditional network operators. By contrast, network operators bear regulatory burdens in excess of those carried by their service only counterparts. This undermines the ability of network operators to innovate and compete in the long term.

Whilst we welcome the disruptive innovation that such services may bring, the distortion to competition caused by differing levels of regulation is less healthy. So too, the current and growing disparity in consumer protection which will ultimately lead to consumer harm and detriment.

We therefore urge policy makers to give thought to the market paradox that such development has caused. Both the UK Government, its counterparts across Europe, and the European commission needs to finally grapple with the regulation of aspects of service, and particualry, Over The Top provision, not only to keep consumers safe from harm but also to promote healthy, open and fair competition. Action in this area is increasingly necessary if policy makers are to ensure the viability of the European communications market in future.

Responses to specific questions raised in the Review of competencies Call for inputs.

<u>To what extent do you think EU action on the free movement of services helps or hinders UK businesses?</u>

Three believes that action on the free movement of services has broadly helped UK businesses and is good overall for the UK economy. They have opened up new markets to and expanded customer bases while introducing greater competition to the UK market. In the long term this can only be good for UK businesses.

Three believes that further action could be usefully undertaken at an EU level to further reduce barriers to the provision to the free movement of services. In the communications sector this means further action to reduce barriers to entry, as well as barriers to the low cost roll out of infrastructure improvements and new services. It also means measures to improve competition, such as removing obstacles to consumer switching.

Greater liberalisation at a national level is welcome as this helps improve the competitive dynamics of the market to the benefit of business and consumers. However, if this is not matched with action at a European level then it is only of limited value.

How well or otherwise have the EU's mechanisms for delivering the free movement of services worked?

Three believes that the EU's mechanisms for delivering free movement of services have worked well. This does not mean that there is no substantial scope for improvement (or that Member States might on occasion be in a better position to affect action to facilitate the free movement of services themselves) but that European mechanisms for delivering the free movement of services have been broadly effective and delivered for consumers and business in the UK. We doubt that the UK government would have been able to deliver the same outcomes in isolation.

As noted, in the communications sector, the free movement of services has been provided for by the Electronic Communications Framework. This series of Directives implemented in two tranches, first in 2003 and then revised 2011 to take account of technological and market change, has driven the liberalisation of the sector. It has brought improved consistency to the regulation of communications services across Europe and removed a number of competitive bottlenecks around access and wholesale cost. Further, it has sought, with some success, to remove incumbent advantage and ensure consistency of consumer protection in Member States.

Perhaps most importantly, the Electronic Communications Framework has opened up the wider European market to increasingly open competition and has enabled the entry into the market and growth of challenger successful operators, like Three, to the benefit of consumers and the UK and European economies. It is highly unlikely that similar action at Member State level could have brought this level of advantage at the wider European level. This can only come through consistent and determined action to promote competition and open and fair markets at an EU level. At a domestic level, despite the overarching pro-market approach pursued by the UK Government, there are pro-competitive interventions that still need to be made to reduce wholesale costs to ensure the future health and dynamism of the communications market.

Do you think the UK's ability to effectively regulate cross-border provision of services would be better, worse or broadly the same as the result of more or less EU action?

Three believes that the UK ability to regulate cross border provision of services is broadly governed by the extent of EU action in this area. Three believes that there is more that can be done at a European level to remove anomalies that still exist within the single market and act as barriers to the free movement of services. These include archaic practices on the part of some national regulators in the communications field, often to the benefit of incumbent operators, to the more prosaic differences in customs procedures, which prevent operators in Europe from realising the full benefit of economies in that a single market should bring.

Three is not clear how the UK's ability to effectively regulate cross border provision of services could be improved through less action at an EU level, as the UK would be unlikely to able to effect the changes needed to improve the effectiveness of the regulation of cross border provision of services in Europe and beyond. Indeed, Three suggests that the ability of the UK to regulate cross border provision of services is directly to its position in Europe. Three is not convinced that UK-led bilateral and multi-lateral treaties would deliver the same outcomes for consumers or business.

Is there a case for more EU action to ensure that assessments for proportionality and necessity are more consistently interpreted? Or should the competence to assess these remain with Member States?

Three believes that is a clear case for the more consistent assessment of proportionality and necessity of policy measures both at European level and also in the UK across Member States.

Assessments of the proportionality and necessity of legislative measures vary significantly in quality and impact across Member States, leading to differences in implementation which must be accounted for at cost by businesses operating in more than one Member State. Recent examples of such inconsistent practice can be seen in the assessment and implementation of recent changes to provision in the e-Privacy directive on Cookies. This has led to a patchwork of ineffective and inconsistent regulation across the EU. This is not good for business or for consumers.

Three believes that recent Government innovations in the UK around one in one out regulation, as well as the introduction of impact assessments that are more clearly rooted in economic evidence as well as their assessment by the independent Governmental bodies in Whitehall (the RRC and RPC), have led to improvements in the overall quality of economic regulation and some other economic policy in the UK. However, the impact of these developments is not uniform. Further, there is some evidence to suggest that these bodies can act as a brake on development and reform, as they do not allow for the advancement of change in some arenas (Please see Three's submissions to the Department for Business on the need for change to regulatory appeal processes brought under the Communications Act 2003).

At a European level the quality of assessment as well as the consistency of approach can leave much to be desired. The Commission's recent impact assessments underpinning the Draft Regulation for a Consolidated Single Market for Electronic Communications were inadequate, poorly thought through and largely unevidenced.[3] This is clearly both inappropriate and insufficient for a sector worth over £90bn per year to the UK economy and was criticised as such by BEREC, the Body of European regulators of Electronic Communications. However, this criticism has not given cause the Commission to revisit its proposals.

Economic policy making on such a basis is clearly not acceptable and will likely lead to detrimental outcomes and unnecessary distort the development of the market. Fortunately, such insufficient process is almost unimaginable in the UK, where interventions by the RPC and RRC have resulted in ill-considered policy being red flagged and reconsidered by the appropriate Government Department.

There are clearly lessons from the British experience particularly around the assessment of the proportionality of legislative measures that could be well applied at a European level but this does not mean there is a need for greater subsidiarity in this area, rather better processes at the Commission.

What do you see as the advantages and disadvantages of EU action on the mutual recognition of professional qualifications?

Three's business requirements require a high skill workforce across a range of skill bases. These include engineering and ICT expertise, as well as softer skills including retail and marketing. Our UK workforce is drawn from across Europe and from across the globe. Similarly, Three's sister

[3] Please see: http://berec.europa.eu/eng/news_consultations/whats_new/1673-berec-views-on-the-proposal-for-a-regulation-laying-down-measures-to-complete-the-european-single-market-for-electronic-communications-and-to-achieve-a-connected-continent

operations elsewhere in Europe make use of high skilled labour to provide essential, business critical services. For Three, a clearly understood system for the mutual recognition of professional qualifications is therefore of great importance. EU action on the mutual recognition has worked well, although there is scope for greater efficiency and flexibility. However, it is not clear how this might be improved through more action at a nation state level without the loss of the advantages that exist under the current system and we would not be supportive of greater action at Member State rather than EU level.

Conclusions

Three believes that is important that the Government subjects the quality and consistency of European legislation to rigorous scrutiny, and seeks to drive improvements both at EU level as well as closer to home. This can only improve the function of the single market and the free movement of services. With regard to the issues raised in this submission, Three makes the following concluding observations:

- The balance of competencies is broadly in the right place.
- UK businesses benefit substantively from access to the single European market. They would benefit further from more action at an EU level to remove competitive bottlenecks and barriers to open and fair competition across the single market. It is not clear how action at Member State level might effectively address market issues at a Europe-wide level.
- There are also competitive bottlenecks in the domestic UK market and the UK Government should not shy from addressing these, if the UK is maintain its competitive advantages
- More pressing is the need to address the consistent implementation of EU Directives and regulations both at a Member State and EU level. Currently, a patchwork of implementation distorts competition, harms growth and hampers the development of players capable of competing at a global level.
- The promotion of competition and measures to ensure open, free and fair markets across the single market should be the primary focus of EU directives and regulation. Where the EU and domestic Governments have focused down on delivering true competition in markets, those markets have succeeded.

We hope that this submission is helpful. We would of course be happy to discuss any of the matters raised further if that would be of assistance.

GOVERNMENT'S REVIEW OF THE BALANCE OF COMPETENCES BETWEEN THE UNITED KINGDOM AND THE EUROPEAN UNION

Call for Evidence: Single Market: Free Movement of Services review (Department for Business, Innovation and Skills, October 2013)

The Independent Game Developers Association (TIGA) welcomes the opportunity to comment on the Government's Review of the Balance of Competences Between the UK and the EU.

TIGA represents the UK's games industry. The majority of our members are either independent games developers or in-house publisher owned developers. We also count games publishers, outsourcing companies, technology businesses and universities amongst our membership. Between them TIGA members employ over half of the UK games development sector's workforce.

TIGA's response to this consultation exercise is focused on Question 13, which affords the opportunity to make general points.

Game developers in many competing countries such as the USA and Canada receive tax breaks for games production. No such tax breaks exist in the UK and so the industry has declined. Between 2008 and 2011, employment in the sector fell by over 10 per cent and investment by £48 million. Consequently, TIGA's top priority over recent years has been the introduction of Games Tax Relief. TIGA successfully convinced the UK Government to adopt Games Tax Relief in the March 2012 Budget. However, this measure has yet to come into effect. This is because the European Commission decided to open a formal investigation into the case for Games Tax Relief in April 2013 and it has yet to authorise this measure. The continuing delay to the implementation of video Games Tax Relief risks jeopardising investment, jobs and new projects.

The key EU treaty here is the one on competition law. This falls within the exclusive competence of the EU. This treaty includes the prohibition on State aid and the Commission has the sole competence to decide whether or not a State aid measure is compatible with this treaty. The treaty recognises that state aid for culture (see section 2 below) can be compatible with this treaty, but proposed measures have to be notified and approved in advance, which is where we are with video Games Tax Relief.

TIGA and its members want to see Games Tax Relief introduced at the earliest opportunity. This could be achieved in one of two main ways. The EU could introduce a block exemption in areas of culture and related areas. A block exemption would allow the government of a member state to give state aid for a particular purpose without notification and approval, provided that it fell within the scope of the block exemption. However, from the video games industry's perspectives, there are problems with this approach (see section 1, below). Therefore, it would be preferable for the UK Government to focus on changing the EU's approach towards audio-visual and cultural industries.

1. Introduce a block exemption in areas of culture and related fields

The UK could work to negotiate with other Member States for the EU to introduce a block exemption in areas of culture and related areas. If video games fell within the ambit of culture and related areas, the UK Government could then provide state aid for a particular objective (e.g. Games Tax Relief) without notification and approval. If these circumstances had pertained in 2012 then there would have been no requirement for the EU Commission to have undertaken an investigation into the case for Games Tax Relief. Instead, the UK Government could have given effect to the measure immediately. However, the problem with this approach is that the EU does not automatically treat video games as as audiovisual works or cultural products. Therefore, a securing a block exemption in areas of culture would be of little benefit to the UK video games industry. Instead, we need to change the EU's approach to audio-visual and cultural products.

2. Change the European Union's approach to audio-visual and cultural industries

The Treaty on the Functioning of the European Union (TFEU) prohibits member states from providing support for specific undertakings or industries. The objective of this prohibition on state aid is to ensure that government interventions do no distort competition and trade inside the EU.

However, the TFEU also recognises that certain aid may be compatible with the common market. This includes aid to promote culture and heritage conservation, provided that this aid does not affect trading conditions and competition in the EU to an extent that is contrary to the common interest.

The EU recognises the importance of promoting culture:

> *9. In this context it is important to stipulate that the Treaty recognises the utmost importance of promoting culture for the European Union and its Member States by incorporating culture among the Union's policies specifically referred to in the Treaty on the Functioning of the European Union (TFEU). Article 167(2) TFEU provides that:*
>
> *Action by the Union shall be aimed at encouraging cooperation between Member States and, if necessary, supporting and supplementing their action in the following areas:*
>
> *[…]*
>
> *- artistic and literary creation, including in the audiovisual sector.*
>
> *10. Article 167(4) TFEU provides that: The Union shall take cultural aspects into account in its action under other provisions of the Treaties, in particular in order to respect and to promote the diversity of its cultures.* [1]

The recognition of the principle of supporting culture has significant policy implications:

> *11. Article 107(1) TFEU prohibits aid granted by the State or through State resources, which distorts or threatens to distort competition and trade between Member States. However, the Commission may exempt certain State aid from this prohibition. One of these exemptions is*

[1] Communication from the Commission on State Aid for Films and Other Audiovisual Works (European Commission). See: http://ec.europa.eu/competition/consultations/2013_state_aid_films/index_en.html

Article 107(3)(d) TFEU for aid to promote culture, where such aid does not affect competition and trading conditions to an extent contrary to the common interest.

12. The Treaty rules on State aid control acknowledge the specificities of culture and the economic activities related to it. It contributes to the medium- to long-term sustainability of the European film and audiovisual sectors across all Member States, as well as increases the cultural diversity of the choice of works available to European audiences.

13. As Party to the UNESCO Convention on the Protection and the Promotion of the Diversity of Cultural Expressions, the European Union, alongside the EU Member States, is committed to integrating the cultural dimension as a vital element in its policies and the Commission subscribes fully to its objectives and attaches great importance to the promotion of cultural diversity.[2]

In 2001, the European Commission adopted a Communication which set out the state aid assessment criteria for support for producing films and audiovisual works (the Cinema Communication). This was subsequently extended in 2004, 2007 and 2009 and is currently in the process of being further extended.

The Cinema Communication has been instrumental in promoting and sustaining a vibrant, culturally diverse audiovisual industry in Europe, which makes a valuable contribution to economic growth. For example, Oxford Economics estimates that without the Film Tax Relief, the UK film industry would be around 70 per cent smaller.[3]

While the EU Commission recognises the importance of supporting cultural and audiovisual industries, it has not brought video games under the scope of the 2001 Cinema Communication:

> *24. Conversely, although games may represent one of the fastest-growing form of mass media in the coming years, not all games necessarily qualify as audiovisual works or cultural products. They have other characteristics regarding production, distribution, marketing, and consumption than films. Therefore, the rules designed for film production cannot apply automatically to games. Furthermore, contrary to the film and television sector, the Commission does not have a critical mass of decisions on State aid to games. Consequently, this Communication does not cover aid granted to games. Any aid measures in support of games not meeting the conditions of the General Block Exemption Regulation (GBER) or the de minimis Regulation will continue to be addressed on a case-by-case basis. To the extent that the necessity of an aid scheme targeted at games which serve a cultural or educational purpose can be demonstrated, the Commission will apply the aid intensity criteria of this Communication by analogy.*[4]

TIGA believes that video games are cultural and audiovisual products on a par with film, television and animation. Consequently, the UK Government should be free to support video games through tax relief and other sector specific measures just as they are at liberty to support these other cultural industries. This policy objective could be achieved in one of the two following ways.

- Video games could be brought under the scope of the Cinema Communication and treated as audio-visual and cultural products. The Commission declined to take this step in connection with the current renewal of the Cinema Communication and that process is now at an

[2] Communication from the Commission on State Aid for Films and Other Audiovisual Works (European Commission). See: http://ec.europa.eu/competition/consultations/2013_state_aid_films/index_en.html
[3] 'The Economic Impact of the UK Film Industry' Oxford Economics, September 2012
[4] Communication from the Commission on State Aid for Films and Other Audiovisual Works (European Commission). See: http://ec.europa.eu/competition/consultations/2013_state_aid_films/index_en.html

advanced stage. However, in principle the scope of the Cinema Communication could be extended to include video games, if not now then separately in the future.

- The Commission could introduce a specific communication affording video games similar treatment as film, television and animation receive under the Cinema Communication. In other words, video games would receive the legal equivalent of the Cinema Communication.

Either approach would recognise video games as cultural products in the same way as film and other audiovisual and creative products. This would set out the framework within which a member state like the UK may support the creation of video games and therefore remove the inequality of treatment that currently exists. It would then be significantly easier for the UK Government to introduce video Games Tax Relief.

Conclusion

The existing balance of competences has not served the UK video games industry as well as they could or should. The industry's top priority is the introduction of video Games Tax Relief as soon as possible. TIGA hopes that the EU Commission will approve this measure in the near future. However, the UK Government should give serious consideration to the following approaches:

- bring video games under the scope of the Cinema Communication; or
- introduce a specific communication affording video games similar treatment as film, television and animation receive under the Cinema Communication.

Dr Richard Wilson
TIGA CEO

What are the advantages and disadvantages of EU action in these areas?

The internal market has brought many advantages for citizens and entrepreneurs in all member countries. On the other hand there exist still many problems and barriers which should be removed to ensure better functioning of internal market.

For example implementation of the Services Directive by the Member States shows that there is still very strong tendency of protectionism to defend the local industry and services providers using different pretexts such as social dumping, public interest, quality requirements etc. There is strong tendency using especially the Directive on posting of workers to prevent competition from cross-border providers of services (see Monti II regulation proposal and proposal of the directive on enforcement). With the economic and financial crisis this tendency strengthened. The problem of unemployment is also very sensitive issue in some countries especially in connection of importing services which has further more direct influence on employment comparing with free trade of goods. The action on EU level is therefore necessary otherwise we should return back to the fragmentation of the EU internal market into 28 national schemes with devastating effect on the EU economy and its competitiveness.

How well have the EU's mechanisms for delivering its policy objectives worked in these areas?

In spite of the fact that the Services Directive covers only part of the services sector it lead to an unprecedented review and reduction of regulation covering services sector in individual Member States. The installation of Single Points of Contact made a major break through the "jungle" of the local certification and authorization systems. The introduction of "tacit approval" of the applications (to provide cross-border services) eased substantially the procedure for companies etc. Still the impact of the services directive did not bring the real quantitative and qualitative leap of cross-border services in desired extent. The peer review of regulated professions organized by the Commission between Member States was a very positive exercise showing the weaknesses and strong points of the implementation of the Directive.

What future challenges or opportunities might we face in these areas?

The answer to the second question leads to the answer of the last one - future challenges must be faced by improvement of the support offered by the SPC to cross-border service providers, the balanced application of the Posting of workers Directive must be found, the Peer review should be repeated regularly. There are also opportunities to extend the scope of the SD to other fields not yet covered. There should be more examples and analysis on the negative impact of protectionist policies in the services sector.

CALL FOR EVIDENCE ON THE GOVERNMENT'S REVIEW OF THE BALANCE OF COMPETENCES BETWEEN THE UNITED KINGDOM AND THE EUROPEAN UNION

DEFENCE PROCUREMENT

Overriding Question: The effect of EU action so far in the defence sector and on the desirability of further action?

A political contribution from **Geoffrey Van Orden MBE MEP**[1]
Conservative Spokesman on Defence in the European Parliament, and
Member of the Defence & Security Subcommittee

Recent historical background

1. Governments across Europe are anxious to increase economic growth. In the UK this ambition is coupled with a desire to rebalance the economy, place more emphasis on manufacturing industry and research & development, and to increase exports.

2. Defence industries are a major contributor to Britain's economic performance. They now employ over 300,000 people and export annually over £9 billion in products, mostly to non-European destinations.

3. Because of distinct characteristics, they are especially vulnerable to changes in government policies and strategic assessments. The UK Defence White Papers of 1957 and 1966, coupled with reports such as that of the Plowden Committee in 1965[2], determined much of the

[1] As Conservative Defence Spokesman in the European Parliament since 1999, as a Member of the Foreign Affairs Committee and of the Defence Sub-Committee of the European Parliament; as a Senior Official in the European Commission's Directorate-General 1A (External relations/Defence & Security Policy) 1995-1999, during the DGIII/DG1A tussle over armaments policy; and as a former senior officer on the International Military Staff at NATO Headquarters, Brussels, while serving as a Brigadier in the British Army; I have closely followed, over two decades, the development of EU defence policy (now the Common Security and Defence Policy or CSDP), including EU defence industrial policy.

[2] "The Plowden Report on "The Future of the UK Aircraft Industry" recommended collaboration withEuropean countries on a range of civil and military aircraft projects. The aim of collaboration was to create a European industry to produce aircraft fully competitive with those from the USA (Cmnd 2853, 1965, p91). However, the evidence on unit prices of such combat aircraft as Gripen and Rafale suggests major doubts about the original Plowden assumptions, namely, that national development is 'too costly.' National development also means that a nation captures all the wider economic benefits of the project and does not have to share these with its collaborative partners.The basic assumptions underlying the Plowden Report need to be re-examined. The Report was written at a time when there was confusion about the UK's world role and when its political leaders were desperate to join the EEC. The economic, political, strategic and technology environment facing the UK has changed since 1965; and by 2012, the UK had considerable experience of the costs and problems of collaborative projects." *Hartley, "White Elephants? – The Political Economy of Multi-National Defence Projects", New Direction, October 2012*

structure and direction of the UK defence industry over the years that followed.

4. A general conclusion at that time was that a country such as Britain could no longer undertake the increasingly expensive design, development and manufacture of complex aircraft and missile systems independently and that, unless there was to be total reliance on the United States, it was necessary to work with European partners. This became a permanent policy cliché in Britain. It was no coincidence that, at this time, the UK was trying to join the European Economic Community and burnish its European credentials.

5. France, a country of similar economic size and defence capability, continued to maintain a successful national defence aerospace industry, while at the same time joining collaborative international projects.

The EU ambition

6. There is no more potent symbol of statehood than military power. We should not be surprised therefore, that defence, the very essence of sovereign national interest, should become a key feature of the push for European integration. The creation of an EU defence industrial base, eventually with a common defence budget and common procurement policy is a vital element of this approach. It presupposes acceptance of the idea that there is a state called Europe to which responsibility for security and defence is gradually transferred.

7. The UK is, characteristically, the strongest guardian of its national sovereignty and most reluctant to engage in European integration. It is also the most Atlanticist of the EU countries.

8. The UK brake on EU involvement in defence was removed by Mr Blair at St Malo in 1998 when he agreed with France that the EU should develop an 'autonomous' military capability. Much flowed from that declaration and the UK has fought a rearguard action ever since. The constant dilemma for British governments is that they want the UK to be a good member of the club but don't want too much intrusion from it and find difficulty in convincing the British people of its benefits.

9. After St Malo, while contributing little of practical value, the EU placed its institutional footprint on an increasing range of defence-related activities, wastefully duplicating staff and structures already very well established at NATO. These included an EU Military Committee, an EU Military Staff, an intelligence assessment staff, and a European Defence College to promote an EU defence culture.

10. There is also a meretricious EU narrative of apparent defence activity, including some 30 operational "CSDP missions". However, most were self-generated. Few stand up to scrutiny. And, as it happens, they were mainly civilian. However, military effectiveness was secondary. As the

current High Representative, Baroness Ashton, has stated, the "first (priority for CSDP) is political, and it concerns fulfilling Europe's ambitions on the world stage [...] The EU needs to remain a credible security and defence player on the world stage." More attention is paid to EU military "visibility" than its relevance.

11. The EU has no military requirements different to those of NATO. It may make sense for less capable countries to get together to improve capabilities, provided they have the will to use them, but there is absolutely no need for the EU to be involved in any of this. Nor does the EU need to be involved in multi-national defence industrial projects.[3]

12. Britain's strategic priority is to ensure that the US remains fully engaged in NATO, and, elusively, to get European Allies to develop their military capability in a way that will contribute more effectively to the Alliance. At the same time, the UK quite rightly wishes to continue to have influence in the world and to enhance its high-end industrial capacity as a key contributor to a successful economy. Creating wasteful, duplicative EU structures has never been the solution to this.

13. In the EU, just 5 countries account for 74% of defence equipment spending and most of the defence R&D. There is no sensible justification for involving 27 governments in decisions on these matters and even less in artificially creating defence industries in other European countries where no such industry previously existed.

14. It has taken the current British government to recognise the nature of CSDP and that we cannot, in one breath, seek to distance ourselves from 'ever closer union' and call for repatriation of powers from Brussels, and in another acquiesce in a flagship EU policy designed to deepen political integration and extend EU competence. At the European Council on 19 December 2013 the Prime Minister blocked EU proposals for the EU to have ownership of military capabilities.

The Development of an EU Defence Industrial Policy

15. Defence industrial policy touches on a range of military, strategic, economic and commercial interests. And it is a vital national interest, particularly for the UK.

16. From the beginning, a "European" defence industrial sector was seen as an essential underpinning of the EU's[4] ambition for integration, for the

3 Op.Cit. "White Elephants? – The Political Economy of Multi-National Defence Projects", Prof Keith Hartley, New Direction, October 2012

4 Throughout this paper I use "EU" as covering all its previous formulations (ECSC, EDC, EEC etc) as well as shorthand for the institutions of the EU – firstly the three federalising institutions: the European Commission, the European Parliament, and the European Court of Justice, and then the notional guardian of our national interests, the European Council, bearing in mind that the Council is served by a Secretariat whose officials are part of that same "European Civil Service" as the staff of the Commission and the Parliament; and includes the federalising External Action Service, which is headed by Baroness Ashton,

creation of European Armed Forces, and from the 1990s, to enable the EU to exercise a state-like global role. The 1993 Treaty of Maastricht included a declaration that envisaged the WEU becoming the defence component of the EU with enhanced cooperation in the field of armaments leading to creation of a European armaments agency.

17. The European Commission has since that time sought to intensify the Europeanisation of defence, seeing "a competitive European defence-related industry as a precondition for a European security and defence identity"[5]. France was an early proponent of a European defence industrial policy with the aim of placing French industries in the lead.

18. The language of EU communications, declarations and treaties constantly refers to "European" interests and capabilities as if this is accepted as a natural state of affairs and successor to national interest. Military and defence industrial assets throughout the member countries are aggregated as "European", leading to an inflated calculation of economies of scale, of R & D investment and procurement needs. The calculation assumes that the EU is a natural sum of its parts, ignoring the very raison d'être of national armed forces and defence industries.

19. Over the last 20 years, the Commission, encouraged by some Member States, relentlessly pursued the EU integration policy. While the UK and others have from time to time, slowed this ambition it has, until recently, been a history of steady progress in one direction.

20. The Treaty of Amsterdam in 1997 did not go as far as the Commission had wished. However, it included for the first time the stipulation, in Article J.7.1, that "the progressive framing of a common defence policy will be supported, as Member States consider appropriate, by cooperation between them in the field of armaments".

21. On 4 December 1997 the European Commission presented its communication[6] to Council on defence industrial policy. Given its own internal dissensions, it did not pursue one perspective, but two – a community and a CFSP perspective. Each approach has its own legal basis and rules. It also reflects the continuing struggle within the EU

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double-hatted as High Representative of the Union for Foreign Affairs & Security Policy/Vice-President of the European Commission, who is responsible for EU Defence Policy and Heads the European Defence Agency.

5 European Commission Communication "The Challenge facing the European defence-related industry, a Contribution for action at European level" COM (96) 10 Final dated 24 January 1996

6 European Commission Communication on "Implementing European Union Strategy on Defence-related Industries" (COM (97), 583 final), 4 December 1997. This Communication was drafted by DG III (First Pillar – Industry) and DG 1A (CFSP, in which intergovernmental co-operation was the rule under the Second Pillar). See "Framing the defence industry equipment issue - the case of the European Commission" - Ulrika Mörth.

between those wishing to follow the path of integration and those wanting inter-governmental cooperation.

22. Given this dual nature of the defence industrial sector and defence equipment market, EU single market, competition, public procurement and trade rules would inevitably have an impact.

23. The "pillar" structure within the EU, which had demarcated areas of community competence from those of member state competence (for example, defence and foreign affairs), was finally destroyed by the Treaty of Lisbon in 2009. Now the European Commission had the opportunity for increasing involvement in all aspects of EU policy, including defence.

European Defence Agency (EDA)

24. Since Maastricht the EU has been pushing for a European Armaments Agency to control European defence industries and conduct the full range of procurement activities on behalf of Member States. Not surprisingly, many key Member States have been resistant to this. They eventually agreed to a watered down version in the form of a European Defence Agency (EDA) which, from its inception meant different things to different participants. For the UK it was supposed to be about improving capabilities.

25. The 2009 Treaty of Lisbon formally established the European Defence Agency (EDA) chaired by the High Representative of the Union for Foreign Affairs & Security Policy who is also Vice-President of the European Commission. Its mission now is "to support the Council and the Member States in their effort to improve the European Union's defence capabilities for the Common Security and Defence Policy (CSDP)." In other words, its primary purpose is not to meet Member State requirements but to be another instrument supporting the development of CSDP.

26. Over many decades, NATO had already developed enormous expertise in the area of defence capabilities development through its Defence Investment Division, Programmes Office, and numerous Agencies, with the additional thrust of its Defence Capabilities Initiative (DCI) in 1999.

27. Most EU Member States are NATO members. The EU, in pursuit of its own agenda of creating an autonomous European defence arm, ranges around to find roles for institutions it has created. It duplicates activity that is already being carried out in NATO or which might better be achieved by NATO. Further overlap is observed in the EU's "Pooling & Sharing" initiative and NATO's "Smart defence".

28. There are well-established mechanisms to enable national and Alliance capability gaps to be overcome. To take the much-vaunted Air-to-Air Refuelling initiative, there are already a number of agencies and organisations competent to deal with this matter – OCCAR, MCCE,

EATC - even the EDA recognises that the capability needs to be available for NATO and other operations, as well as its EU remit. It is not clear that progress would not be made perfectly well on the usual 4 or 5 nation basis, fulfilling NATO as well as national requirements, without any need for the existence of the EDA.

29. The EDA is a classic bureaucratic creation. It will always find more things to do generating the need for more personnel and seeking an increased budget (The UK has succeeded in maintaining pressure for zero growth in the budget). The EDA does not fulfil an essential purpose and any useful tasks can equally well be achieved using established mechanisms.

Permanent Structured Cooperation (PESCO)

30. PESCO is a Lisbon treaty innovation which has yet to be adopted. It is available to those Member States whose armed forces "fulfil higher criteria and which have made binding commitments to one another with a view to the most demanding missions". It can be created by QMV, enabling development of a highly integrated military capability among a small number of Member States, who will then have the exclusive right to decide who might join at a later date. PESCO involves a commitment to EU multinational combat units; participation in European equipment programmes and in the activities of the European Defence Agency; agreed level of expenditure on defence equipment; harmonisation of defence equipment requirements; cooperation in training and logistics; and possible review of national decision-making procedures. In effect it would enable creation of an "EU Army". It remains in the locker of those that may choose to advance more rapidly in terms of defence integration.

The European (Defence) Council 2013

31. The December 2013 European Council, with its focus on CSDP, had been heralded as the moment when EU defence policy would achieve lift-off. In fact, although the Council Conclusions are naturally replete with references to "Europe" the Council was something of a reversal for the EU integrationists. Its emphasis is on cooperation between Member States and on the civil, rather than military, aspects of CSDP with critical shortfalls addressed by "concrete projects by Member States" and capabilities "owned and operated by Member States".[7]

Conclusions

32. There may be a case for cooperation in multi-national defence projects but these do not require the involvement of the EU.

33. The EU brings no added value to defence. On the contrary it distracts

7 European Council 19/20 December 2013 Conclusions - EUCO 217/13, Brussels 20.12.2013

some European allies from wholehearted commitment to NATO and wastes resources and effort through duplication of activity. Furthermore, there is no evidence that EU involvement in defence has encouraged any European country to reverse its cut-backs in defence or to be more willing to contribute to military operations or capabilities.

34. The primary purpose of EU involvement in CSDP and defence industrial policy is the political objective of "ever closer union". Those that believe in this objective will support CSDP and find good reasons for it. Some do not understand the significance of this objective and make judgements on a pragmatic, case-by-case basis. Those that do not share the federalist political aim of the EU and who attach importance to the NATO alliance oppose CSDP.

35. The EDA is designed to give more substance to CSDP. It is another example of an EU institution looking for a role. If it is really about improving Member State capabilities then its mission needs to be redefined.

36. As can be seen from the examples of Norway and Switzerland, both EDA partners, there is no reason why the UK's position as a member of the EDA should be affected by its involvement or non-involvement in the EU's wider CSDP activities.

37. The main case for staying in the EDA seems to rest on the concerns of industry 'not wanting to miss out' on opportunities. It is not clear what those opportunities really are. As it is, the UK only participates in some way in just 4 out of 10 EDA headline projects.

38. If the objective is to generate more military capability from reluctant European nations, there is no reason why this could not be done, and more effectively, within NATO – thereby avoiding duplication, costs, and confusion.

39. Ideally, the EDA should be adapted to become part of the NATO structure to avoid duplication and as part of a wider reinvigoration of the Alliance.

40. Independent British military power, and the willingness to deploy it, backed by strong, innovative defence industries, cannot be separated from wider questions of Britain's prestige, economic well-being, and the confidence of friends and allies around the globe. The enormous political, strategic and economic relevance of defence, beyond its pure military effect, is often underestimated.

41. Britain should be able to engage in cooperative defence industrial arrangements with whatever country or group of countries, European or non-European, is most beneficial to our national interests and not be constrained in this regard by EU policy. Our primary interest should be to ensure that British and British-based defence industries, not some

remote European industry, are there to meet our national needs and are successful in global terms.

42. The European Union should be encouraged to focus on its civil capabilities which could complement the military capabilities of NATO and of coalitions of the willing.

ENDS 13 January 2013

WIRTSCHAFTSKAMMER ÖSTERREICH

Answers to the questions

1. **What do you see as the advantages and disadvantages of EU action on the free movement of services? How might the national interest be served by action being taken at a different level (for example, at the World Trade Organisation level, or at the national level), either in addition to or as an alternative to EU action?**
   The free movement of services guarantees to EU companies the freedom to establish themselves in other Member States, and the freedom to provide services on the territory of another EU Member State other than the one in which they are established. The principles of freedom of establishment and free movement of services have been clarified and developed over the years through the case law of the European Court of Justice. We think the European level is the best level to deal with free movement of services. The national level would be too narrow and the WTO level is not realistic.
2. **To what extent do you think EU action on the free movement of services helps or hinders UK businesses?**
   It helps UK businesses but there is still a gap between the vision of an integrated EU economy and the reality as experienced by European citizens and service providers.
3. **To what extent has EU action on the free movement of services brought additional costs and/or benefits when trading with countries inside and outside the EU? To what extent has EU action on the free movement of services brought additional costs and/or benefits as a consumer of services?**
   The benefits of the services directive outweigh its costs. Small and medium sized enterprises (SMEs) in particular, are disproportionately affected by complex administrative and legal requirements and therefore more likely than larger firms to turn down cross-border opportunities because of them. Given the predominance of SMEs in service operations, this has clearly acted as a considerable hindrance the development of the Internal Market for Services.
4. **How well, or otherwise, have the EU's mechanisms for delivering the free movement of services worked?**
   Yes they work, but there is still a lot to do.
5. **In your experience do Member States take a consistent approach to implementing and enforcing EU rules, or not?**
   It depends to what extend they are affected. Austria with its long borders to other EU countries is dependent on cross border trade in services.

6. **Do you think the UK's ability to effectively regulate cross-border provision of services would be better, worse or broadly the same as the result of more or less EU action?**
   It needs EU rules for cross border service delivery, and UK rules for trading or delivering services within the UK.

7. **What future challenges/opportunities might we face in the free movement of services and what impact might these have on the national interest? What impact would any future enlargement of the EU have on the free movement of services?**
   The enforcement is a big challenge. There is a need of a European Administrative enforcement agreement for effective cross-border enforcement in the internal market.

8. **Is there a case for more EU action to ensure that assessments for proportionality and necessity are more consistently interpreted? Or should the competence to assess these**

remain with Member States - as is the case now?
The Commission should assess together with member states.

9. Should decisions affecting the integrity of the Single Market be taken by all Member States and apply equally to all or do you believe it is possible to take further liberalising action either unilaterally or with a selection of other Member States while maintaining the integrity of the Single Market?

The four freedoms are the pillars of European integration and therefore should apply for all member states. Further liberalisation of certain member states (single countries – internal liberalisation?) while maintaining the integrity of the Single Market will be difficult. Or is the question related to harmonisation versus minimum requirements? In our view it is depending on the topic if we need harmonisation or minimum requirements.

10. What do you see as the advantages and disadvantages of EU action on the mutual recognition of professional qualifications? To what extent do you believe that the cost of existing or future European rules in this area is proportionate to the benefits?

Advantages: easier mobility, advantages especially for entrepreneurs in border regions
Disadvantages: possibility that there may be services offered without the necessary qualification.
Nevertheless we are convinced that the advantages will outweigh.

11. What do you see as the advantages and disadvantages of EU action on company law? To what extent do you believe that the cost of existing or future European rules in this area is proportionate to the benefits?

EU company law can be a basis to make it easier for companies to act within the Union in their daily business. Nevertheless this daily business depends on much more influencing legal factors (e.g. tax regulations). It seems that the European Commission sometimes forgets these connections when presenting actions on company law.

EU company law itself is dispersed in various acts. This fact makes it difficult to handle in this topic within an appropriate time. Furthermore the Union shall bear in mind its limited competence according to the Treaties and should therefore avoid any action in this area which does not fall in its competence. E.g. the draft for a SPE-regulation did in many points violate this fundamental principle.

Nobody can be able to know in detail future European rules in this area. Thus the question of the cost cannot be answered seriously.

12. What do you see as the advantages and disadvantages of EU action on public procurement? To what extent do you believe that the cost of European rules in this area is proportionate to the benefits? What is your view of the effect on the defence sector?

As always there are advantages and disadvantages, the EU`s public procurement sector is no exception. The fact that throughout Europe public procurement has to be played by similar and defined rules is definitely an asset. Thought the overregulation that followed over the years is a downside. Especially when public procurement with lower thresholds is concerned, there should be less bureaucratic rules imposed in the near future to ensure that the costs and benefits are proportionate. Both sides of the bidding process would benefit from such a liberation step. It would help to reduce the time and money that needs to be spend for a certain public procurement process.
Austria has an own set of rules concerning public procurement in the defence sector, which is in accordance with the relevant EU regulations. So far there have not been any cases applicable to this specific law.